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Current Topics.

THE Supreme Court of the United Stated has lately decided a case—United States v. McKee *et al.*—based on a claim a century old, and which both from the antiquity of the transaction, and the stirring events which gave it existence, may be considered as fairly illustrating the romance of the law. Soon after the Declaration of Independence, and while the strife was at its fiercest, the state of Virginia was threatened with the loss of her vast territory west of the Ohio river, now comprising five populous states. The French had settlements and trading-posts there, the British claimed it by virtue of the acquisition of Canada, and were making incursions, while numerous and powerful tribes of hostile Indians disputed her title. In order to preserve it, the state commissioned General George Rogers Clarke, a daring and energetic officer, who fitted out an expedition, and "in one of the most romantic campaigns which the history of that region down to this day affords" (this is the language of the decision), drove out the enemy, and asserted the supremacy of Virginia over this vast region. That state, then the theatre of active strife, had her hands full, and could give but little help to the brave officer who, hundreds of miles away amid forest wilds, was maintaining her right of domain. It seems, however, that at that early day Virginia had an agent in New Orleans, then a Spanish settlement of some importance, and on this agent General Clarke from time to time drew drafts, to carry on his expedition. These were paid, except one in favor of one Francis Vigo, for $8,616, drawn in 1778. In 1780 this vast territory was ceded by Virginia to the general government, and in the act of cession, the payment of such claims as this was assumed by it. In the year 1835 the commissioner of revolutionary claims of the state of Virginia passed upon it, fixing the claim at $32,654.85, and now the supreme court on appeal from the court of claims gives judgment for the original amount with interest, running almost through the first century of our national existence. The decision is appropriate to the centennial year.

MR. O'CONNOR'S CASE.—The committee appointed by the bar association of New York to investigate the charges brought against Charles O'Connor has made its report, and the finding has been accepted and confirmed by the association. The tribunal finds: 1. That there is no evidence that Mr. O'Connor became counsel for Mr. Forrest with an understanding that the services were to be gratuitous. 2. That the testimony of Judge Daly, who presented the silver vases on behalf of the ladies, shows, that the presentation was not made with the impression that Mr. O'Connor's services were gratuitous, and that he did not permit the people to continue under the idea that he had agreed to conduct the case without compensation; and lastly that Mr. O'Connor did not make exorbitant charges for his services. Mr. O'Connor has vindicated himself from a charge which was at once flimsy and contemptible. The charges were first made public by a New York newspaper, but when the eminent counsel against whom they were directed had obtained a tribunal to investigate them, it was found that there was not a scintilla of evidence to support them. The report of the committee closes with this eulogium. "Through many years the name of Charles O'Connor has been known to our community, and the whole country, as synonymous with eminent ability and spotless purity; such a reputation could not be marred, without injury to the profession he so long adorned, and pain to his countrymen. But conscious of his integrity, and sensitive to the slightest imputation upon it, he persevered, even against the judgment of wise professional brethren who loved and honored him, in demanding investigation of the charges referred to. And now five of our fellow-citizens, eminent for wisdom and goodness, have fully heard the evidence, and have unanimously pronounced the charges without foundation." Mr. O'Connor may well feel proud of these words, and well satisfied that he did not allow the slander to live. In a long and successful practice at the bar, he has been uniformly successful. But he was unlucky in this, that, in perhaps his most important and most celebrated case, it was his misfortune to have a woman for a client. As one of our contemporaries well puts it, "The great lawyer has shared the experience of every other lawyer who ever had a female client, that angelic as she is, theoretically she is ignorant, like the angels, of worldly affairs, and so expects three things with respect to her attorney; first to monopolize his time and attention; second, to find fault with him and be dissatisfied with him from first to last; and third, not to pay him much, if any thing, for his services."

WITHDRAWAL OF OFFER OF REWARD FOR APPREHENSION OF CRIMINALS.—In the Supreme Court of the United States judgment was recently given in the case of Shuey, executor of Henry B. St. Maire v. The United States. It was an appeal from the court of claims for service rendered by the plaintiff's testator, it was alleged, in the apprehension of John H. Surratt. The court below found that the service rendered was, not the apprehension of Surratt, for which the war department had offered a reward of $25,000, but giving information that conduced to the arrest, and gave judgment in favor of the United States, which on appeal is confirmed. These are quite distinct things, though one may have been a consequence of the other. The proclamation of the secretary of war treated them as different, and while a reward of $25,000 was offered for the apprehension, the offer for information was only a "liberal reward." The findings of the court of claims also exhibit a clear distinction between making the arrest and giving the information that led to it. It is found as a fact, that the arrest was not made by the claimant, though the discovery and arrest were due entirely to the disclosures made by him. The plain meaning of this is, that Surratt's apprehension was a consequence of the disclosures made. But the consequence of a man's act are not his acts. Between the consequence and the disclosure that leads to it, there may be, and in this case there were, intermediate agencies. Other persons than the claimant made the arrest, persons who were not his agents, and who themselves were entitled to the proffered reward for his arrest, if any persons were. Therefore, at most, the claimant was entitled to the "liberal reward" promised for information conducing to the arrest, and that reward he has received. But if this were not so, the judgment given by the court of claims was correct. The offer of a reward for the apprehension of Surratt was revoked on the 24th day of November, 1865, and notice of the revocation was published. It is not to be doubted that the offer was revocable at any time before it was accepted, and before anything had been done in reliance upon it. There was no contract until its terms were complied with. Like any other offer of a contract, it might, therefore, be withdrawn before rights

had accrued under it, and it was withdrawn through the same channel in which it was made. The same notoriety was given to the revocation that was given to the offer. And the findings of fact do not show that any information was given by the claimant, or that he did anything to entitle him to the reward offered until five months after the offer had been withdrawn. True, it is found that then and at all times until the arrest was actually made, he was ignorant of the withdrawal, but that is an immaterial fact. The offer of the reward not having been made to him directly, but by means of a published proclamation, he should have known that it could be revoked in the manner in which it was made.

DUTIES OF RECEIVERS.—In the United States Circuit Court for the Eastern District of Missouri, in the case of Ketchum v. The Pacific Railroad, Mr. District Judge Caldwell has been called upon to define the duties of receivers in regard to defending of suits. The case was a suit to foreclose a mortgage on a railroad, and liens. The railroad and its property were in the hands of receivers appointed by the court. Mr. Bowman of counsel for the receivers claimed the right to file exceptions to the report of a Master, in favor of the payment of certain claims for supplies which had been furnished to the lessees of the railroad before the receivers took possession. This motion the court denied. In delivering his judgment the learned judge in substance said, that the receivers appointed by a court of equity are simply the officers of the court—a part of the court itself. They are merely the agents of the court whose duty it is to keep in custody and preserve a fund which the court has taken into its possession for the purpose of distributing it among a number of different creditors claiming interests therein. They are naked trustees, and have precisely the same interest,and no more, in the manner in which the fund in their hands shall be distributed, than the court itself has. It was clear, the learned judge thought, that if other creditors interested in the fund, being before the court, make no objection to these claims being treated as prior liens, the receivers of the court could make none. To permit them to do so, would be to permit them to intermeddle in a matter which did not concern them in the remotest degree. The attention of the court was called to an order heretofore entered in this cause authorizing the receivers to defend suits brought against themselves or against the Pacific Railroad Company, but the learned judge thought that this order related only to suits brought by outside parties in other courts, where the right to recover was contested by the defendant corporation, and where the corporation by reason of being dispossessed of its assets, might not be able to make the proper defence itself; or to the case of proceedings in other tribunals in which an attempt is made, by attachment or otherwise, to reach the fund in the hands of the receivers. In such cases, the learned judge said, the receivers would be authorized to defend without any specific order to do so. But where, as in this case, the claimant makes a formal intervention in this court, and becomes a party to this proceeding, it becomes simply a contest between different creditors or between different parties claiming to be such, with which the receivers have nothing to do. There might, however, be special cases of this nature in which it would be desirable, in order to protect the interest of both parties, and to prevent a confusion of litigation and an accumulation of costs, to have a formal defence made by the receivers. When such a case should arise, the court would advise the receivers of their duty. It was enough to know that such was not the present case. The learned judge therefore refused to hear the counsel for the receivers in opposition to these claims, and the report of the Master was confirmed.

Will-Making.

Time was when a man's will was regarded with respect, as the last solemn expression of his wishes. It was considered that the property he had toiled for in life, and the fortune he had builded, should carefully follow the dispositions he made while yet in the possession of the "sound mind and disposing memory." It was only assailed when, if clothed with proper formalities, it sought to contravene the healthful policies of society, or to perpetuate and continue to unlimited time, that which had furnished the occupations and ambitions of a busy lifetime, and which, as entails at common or substitutions at civil law, were reprobated, and forbidden. This has somewhat changed, and for years past one of the most fruitful sources of ponderous, and to the profession lucrative, litigation has grown out of will contests. Almost every imaginable question that can arise in the constructions of wills has been handled by able lawyers and judges, and the contrariety of judgment on this, as on every other point of much elaborated law, now makes the will of every rich testator the subject of judicial enquiry, and the estate a noble grist to be ground through the legal mill. Nor is there much delay. The flavor of the "funeral baked meats" has scarcely left the palate, or the shoes grown old in which the weeping ones followed the plumed hearse to the tomb, before busy lawyers are tugging at the rich mass, and the machinery of the courts set in motion.

The colossal fortune left by the great millionaire merchant of New York, it seems, must follow the general rule, and already has commenced the skirmishing that preludes a rich warfare. The Turneys and Baileys, claiming to be relatives, have instituted proceedings to annull the probate of the will, an the ground that it was admitted at the residence of Mrs. Stewart, instead of at the surrogate's office. Eminent counsel in New York have pronounced this sufficient ground to set aside the probate, and the opinion is likely correct. In this event, however, it would not prevent a probate properly made, but the assailants would have the prestige of the first success. On the 13th of April, Mrs. Stewart made the affidavit that she, the widow, was the only heir and next of kin, and that her husband "left surviving neither father, mother, brother or sister, or decendants of any or either of them, or any descendant of his, or any relative or next of kin." Such an affidavit would be awkward in the law of the proved kinship of the plaintiffs, who, it is said, can prove that Mr. Stewart recognized the relationship and addressed letters to them. This, however, would raise no issue of merit, as the fact might not have been known to Mrs. Stewart. Still, to successfully traverse the affidavit would be another "coigne of vantage" to the assailants, in the preliminary struggle. The real point in the contest is, that the testator was unduly and improperly influenced in making his will. To the outside world who knew Mr. Stewart, this would seem a bold charge; for up to the period of his last illness his faculties, mental and physical, were so well preserved that he remained master of his vast affairs, even to the minutest details. That the point will be earnestly contested however, appears from the fact that, besides the prominent attornies conducting the preliminaries, it is said that some of the most brilliant counselors of the metropolis have been retained. The plaintiffs are rich themselves, and with the rich prize staked on the issue, and an array on either side of the greatest lawyers of the land, one can estimate how brilliant and tremendous the contest will be. There would be more satisfaction in watching its progress, if we could be assured that it would be carried through on true legal principles; but in these days men have become bold and uncrupulous in the use of money. "In the corrupted currents of this world, Offence's gilded hand

may shove by justice and oft' tis seen the wicked prize itself buys out the law."

Punishment of Accomplices who Turn State's Evidence.

The law looks upon the testimony of accomplices with a good deal of suspicion, and refuses, in the absence of corroborating circumstances, to suffer a conviction on the strength of it alone. But it frequently happens that by the aid of such evidence, strengthened by other facts, themselves too slight to stand alone, the guilty are brought to judgment. The state having made use of the co-conspirator to secure a conviction, he stands in a different position from an ordinary criminal. It is usually undersood that he shall not be tried, as that might prevent his testimony from being perfectly truthful. In the leading case in England, Rex v. Rudd, Cowper, 331, Lord Mansfield laid down the law on this subject to be that, although it was not a matter of right that when accomplices made a full confession of the whole truth, which has been made use of by the crown to convict other offenders, if they have acted fairly and openly, the usage and lenity of the court is to stop the prosecution against them, and they have an equitable title to a recommendation for mercy. In this country the practice in such cases is similar. The Supreme Court of the United States, in U. S. v. Lee, 4 McLean,103 said: "The government is bound in honor, under the circumstances, to carry out the understanding or arrangement by which the witness testified, and admitted, in so doing, his own turpitude. Public policy and the great ends of justice require this of the court."

In the United States District Court at St. Louis last week, the cases of the distillers and rectifiers, members of the celebrated whiskey-ring, whose evidence had been used in the trials of the chief conspirators, were called, for the purpose of sentence being passed. Mr. Broadhead, special counsel of the government in those trials, delivered an able address on the above subject, as follows:

"As prosecuting officers of the government, it may be proper to make a statement to the court in regard to the cases now before it, as well as in regard to the cases of other parties not now before the court of final disposition, with the view of explaining the course we have thought proper to pursue in the prosecution of all those cases. Many of the parties now arraigned, and others whose cases will be brought up hereafter, have been used as witnesses against greater offenders, who have heretofore been convicted, in accordance with a well-established practice in criminal proceedings. They have been of infinite service in these prosecutions. Without their aid and assistance it is possible that there would have been no convictions. It is due to them as well as to the cause of public justice and the interests of the government that this statement should be made, and that these parties should receive whatever benefit they are entitled to from such statement.

"It has been remarked by an eminent jurist "that whilst the law confesses its weakness by calling on the assistance of those by whom it has been broken, and offers a premium to treachery, on the other hand, it tends to prevent any extreme agreement among atrocious criminals, makes them perpetually suspicious of each other, and prevents the hopelessness of mercy from rendering them desperate. The People v. Whipple, 9 Cowen, Chitty's Criminal Law, p. 2, 603, 769. In general there is no promise of pardon to a man who becomes a witness against his accomplices, and in this instance there has been none, though if he makes a full and complete disclosure he will have an equitable claim to the mercy of the government, and the court will on application put off the trial to enable him to apply for a pardon. 1 Chitty Crim. Law, p. 604. This is derived from the old practice of approvement, which is superseded by the modern practice of admitting accomplices to give evidence, under an implied promise of pardon on condition of their making a full and fair confession of the whole truth, This implied promise arises from the consideration that the witness who is not bound to criminate himself avers so in order to discover greater offenders, and upon the preformance of the condition to the satisfaction of the court he acquires an equitable title to a pardon. See People v. Whipple, 9 Cowen 710; King v. Rudd, Cowper, 331. Lord Mansfield, in delivering the opinion in the latter case and referring to a case decided by Gower, justice, said that 'all the judges were of the opinion that in case of an accomplice who fully and truly discloses the joint guilt of himself and his companions, and truly answers all questions that are put to him, and is admitted by the justices as a witness against his companions, and who when called upon does give evidence accordingly, and who acts a fair and ingenious part, ought not to be prosecuted for his own guilt so disclosed.'

. "And Judge Duer, in the case of The People v. Whipple, says: 'If an accomplice perform the condition on which he is admitted as a witness for the people, according to its spirit, we hold ourselves bound in duty and in conscience to redeem the promises, which the law raises in his favor, to the very letter. If we are correct in these principles, the question of the admission of Stang as a witness is reduced to the simple enquiry, whether in the sound exercise of the discretion vested in us, we believe that it would promote the ends of public justice to admit him as a witness on the trial, and thereby entitle him, if he speaks the truth, to immunity in the event of the prisoner's acquittal.' 9 Cowen, p. 717.

"In the case of the United States v. Lee, 4 McLean, 103, the court says that if an accomplice be admitted to testify, and appears to have acted in good faith in giving his testimony the government is bound in honor to discharge him.

"This is the English and American doctrine as to what an accomplice is entitled to in case he becomes a witness for the state. In some cases the court will recommend a pardon, which in England follows as a matter of course. In others it will give ample opportunity for the party to apply for a pardon to the proper authority. By express law of the United States, and according to the decisions of the courts of all the states, with one exception, an accomplice is a competent witness, and the rule which gives him an equitable right to a pardon follows, if he has acted fairly and told the truth.

"Of course, it is not the province of the court to pardon. But as it is not the practice of our courts to recommend pardons, because it is not thought proper that one department of the government should interfere in any manner with the duties belonging to another, and inasmuch as the court is vested by the law with a large discretion in affixing penalties for particular offences, it is proper that the considerations which have been mentioned should address themselves to the conscience of the court in rendering judgments in these cases. It is the opinion of an eminent writer on criminal law that in the United States, where prosecutions are instituted and carried on by a public prosecutor, who acts directly for the government and protects its interests, there is an evident propriety in considering it to be within the exclusive discretion of this office, to determine whether or not an accomplice shall be permitted to become state's evidence, and whether if he does, he is afterwards entitled to be no further prosecuted by reason of what is thus done. See 1 Bishop on Crim. Procedure, Sec. 1,076 and note.

"If we can not act in these cases by reason of the condition in which they now stand before the court, there are cases of individuals connected with this conspiracy in which it is the

purpose of the prosecuting officers to take the responsiblity of dismissing certain indictments against parties who have been of eminent service in developing and bringing to light the details of this most gigantic conspiracy. They have acted faithfully, and as we believe have testified truthfully. They have shown no disposition to smother investigation or to avoid responsibility. The result is the conviction of a number of offenders, the forfeiture and confiscation of a large amount of property, and the obtaining of judgments on bonds for over $1,000,000, which will in some degree reimburse the government for the losses which have been sustained.

"There is another consideration to which we wish to call the attention of the court, arising from the nature of this conspiracy, and the relation which most of the parties now before the court now sustain to it. Originally this was a conspiracy of office-holders—men who had been entrusted with the guardianship of the public interests and the collection of the public revenue, and who, from their positions and the immense power which the law placed in their hands, held the distillers and rectifiers with an iron grip, and could at any time have crushed them; and the history of the conspiracy shows that this power which the law gives them was exercised with despotic authority; that after having induced some of the distillers and rectifiers to join with them in the manufacture and sale of illicit whiskey and reduced the price of the article in the market so as to cause a virtual suspension of the business on the part of those who still obeyed the law, they actually threatened them with prosecutions unless they would join this illegal combination, and that thus some of these men were forced under the threat of legal prosecutions to join the conspiracy, and became the victims of this conspiracy of officers-holders. No court of justice can be blind to these considerations in passing final judgment upon these men. This much we have thought was due as well to the cause of public justice as to the parties now before the court."

Judge Treat, recognizing the justice of the principle, sentenced each of the defendants to a nominal imprisonment and the payment of a fine.

Negligence—Duty of Railroad Companies as to Track and Structures—Rule of Damages.

GOHEEN v. THE TEXAS AND PACIFIC RAILWAY COMPANY.*

United States Circuit Court, Western District of Texas, April Term, 1876.

Before Hon. THOMAS H. DUVAL, District Judge.

1. **Duty of Railroad Company.**—It is the duty of a railroad company to lay its track and road-bed and to construct bridges, culverts and embankments in such manner, and to keep them in such condition, as to render the same safe for the public use as well as for its employees

2. **Unforseen Events.**—This obligation does not require it to provide against dangers which could not reasonably be foreseen, and it is not bound to secure the track against events which could not be anticipated by reasonable men, such as an unprecedented flood, or other unusual visitation. This applies most strongly to new roads.

3. **Limit of Liability.**—If a particular structure is without fault as to plan, mode of construction and character of material, so that it was originally sufficient for all the purposes for which it was designed, and if the railroad company has it afterwards properly inspected by competent and skilful men, who exercise ordinary diligence to keep it in repair, the company has discharged its duty, and is not liable to an employee for an injury received by reason of a defect in said structure, unless it is shown that the company had actual notice of such defect, and after notice failed to remedy it.

4. **Damage.**—Actual damages only can be recovered, and they are to be confined to the pecuniary loss sustained by the plaintiff by reason of the death of her son.

This was an action for damages brought under the act of the legislature of Texas, of February 2d, 1860, which is substantially that of 9th and 10th Vict., commonly known as Lord Campbell's Act. The nature of the suit is sufficiently stated in the charge of the court given to the jury.

Robertson & Herndon, Turner & Lipscomb, and *Geo. L. Hill,* for plaintiff; *William Steadman,* and *I. P. Sexton,* for the defendant.

DUVAL, J.—The plaintiff brought this suit on the 22th day of December, 1874, to recover of the defendant damages for the death of her son, Edward L. Goheen, which occurred on the 24th of March, 1874. It appears from the evidence that at the time of the death of the said Edward L. Goheen, he was in the employment of the defendant as a fireman on a locomotive engine running over defendant's road, and that while crossing a bridge on the south side of Cypress Boyau in Harrison county, the said bridge gave way, causing the engine to be precipitated into the stream below, and killing the said Edward L. Goheen.

The plaintiff avers that this accident and death was solely owing to the fault and neglect of the defendant by reason of the defective construction of said bridge, and its dumps or embankments. And it is for the jury to determine from the evidence before them whether this averment is true or false.

I have to instruct the jury, that in constructing and operating a railroad, the law imposed upon the defendant the obligation to make it substantial and safe. It was the duty of the defendant to lay its track and road-bed, and to construct bridges, culverts and embankments, in such manner, and to keep them in such condition, as to render the same safe for the public use, as well as for the employees of the road. This obligation, however, on the defendant, did not require it to provide against dangers which could not be reasonably foreseen; and it was not bound to secure the track against events which could not be anticipated by reasonable men, having the ordinary sagacity required in the business of making railroads, such as an unprecedented flood, or other like unusual visitation or occurrence.

This rule applies most strongly to all roads, when recently constructed, and before there has been sufficient time and experience to test the sufficiency and safety of the work done.

On determining the liability of a railroad for defective construction of work, the correct rule to be looked to is whether such work (no matter what the particular structure may be), is without fault as to plan, mode of construction and character of material, so that it was originally sufficient for all the purposes for which it was designed, so far as could then be reasonably determined, and that it employed skilful and trustworthy agents to supervise and examine and test it, and that such duty is performed with frequency, and with such tests as custom and experience have sanctioned and prescribed. When these circumstances all concur and exist, it may be rightly assumed that the road has exercised such care and skill as the law exacts of an employer in reference to his employee, and that no liability can attach to it for a defect in such structure or work by which an employee has sustained injury, unless there has been actual notice or knowledge that such defect existed, and which, unless promptly remedied, would be liable to cause serious or fatal consequences. Tested by this rule, the jury will consider the bridge and embankment in question, and determine from all the evidence before them, whether or not they were without fault as to plan, mode of construction and character of materials, and in these respects met the purpose for which they were designed at the time of their construction, so far as could then be reasonably ascertained and determined by the agents and officers of the road who built them.

If the jury came to an affirmative conclusion on these questions, and believe that the defendant employed skilful, prudent and competent agents to inspect and keep said structure in repair, and that said agents or employees did exercise ordinary and usual care and diligence in inspecting and keeping said structures in repair, and that they remained safe for the running of trains over them until the embankments were washed away by an unusual and extraordinary rise of water, then you are instructed that the defendant was not guilty of negligenee, and you will find for the defendant.

But if the jury believe from the evidence that the bridge and embankments, or either of them, were not properly made at first, either as respects plan, mode of construction or materials used, by reason of the negligence and want of care on the part of the defendant; and such defect, if subsequently known, was not provided for and remedied by means adequate to the purpose, so far as human skill and sagacity could reasonably foresee, under the circumstances then existing; and in consequence of which negligence and want of care, or failure to apply proper means of prevention on the part of defendant, the said Edward L. Goheen was killed, then you will find for the plaintiff.

If the jury should find from the evidence that the defendant was guilty of negligence in the death of said Edward L. Goheen, as alleged in plaintiff's petition, they may, in fixing the amount of damages, take into consideration the age of the plaintiff, the probable duration of her life, the amount of support she might reasonably have expected to receive from the deceased, if this can be determined from the evidence.

You can not consider the poverty or the wealth of the plaintiff, nor her mental anguish or suffering, but you can only allow such damages as you may think proportioned to the injury resulting to plaintiff from the death of her son, as appears from the evidence before you.

In determining whether they will find a verdict for the plaintiff or defendant, the jury are the exclusive judges of all the facts in evidence before them. They will take into consideration the manner and mode of testifying by the witnesses; their intelligence and acquintance with the subject about which they testify; their interest in the result of the suit, if any, and give to each and every portion of the evidence such weight as they may think it deserves.

* Reported for this journal by F. B. Sexton, Esq., Marshall, Texas.

[The jury, after a retirement of about thirty-six hours, came into court and reported that they could not agree. Whereupon they were discharged.]

Sale of Liquor to Indians — Construction of Statute.

UNITED STATES v. DOWNING.

United States District Court, District of Kansas.

Before Hon. C. G. FOSTER, District Judge.

1. **Construction of Statute.**—The act of Congress, (U. S. R. S. sec. 2139), which provides that "every person, *except an Indian in the Indian country*, who sells, exchanges, gives, barters, or disposes of any spirituous liquor or wine to any Indian under the charge of an Indian superintendent or agent, or introduces or attempts to introduce any spirituous liquor or wine into the Indian country, shall be punished," etc., was only intended to prohibit the selling, giving, or bartering of spirituous liquors or wine to an Indian *in the Indian country* and not elsewhere.

2. ——. The words "in the Indian country," refer to the locality of the offence, and not to the habitation of the Indian excepted from the penalty of the act.

George R. Peck, United States District Attorney, for plaintiff; *G. C. Clemens*, attorney for defendant.

FOSTER, J.—The indictment alleges that the defendant did, within the district of Kansas, sell, exchange, give and barter one pint of spirituous liquor to Richard Rice and Peter Burdeaux, both Indians of the tribe and nation of Pottawatomies, and being under the charge of M. H. Newlon, an Indian agent duly appointed, etc.

The defendant moves to quash the indictment for that it does not charge an offence against him.

The law (U. S. R. S. sec. 2139) provides as follows; "Every person, except an Indian in the Indian country, who sells, exchanges, gives, barters, or disposes of any spirituous liquors or wine to any Indian under the charge of an Indian superintendent or agent, or introduces or attempts to introduce any spirituous liquor or wine into the Indian country, shall be punished," etc.

The question at issue involves the construction of the sentence, "except an Indian in the Indian country."

Do the words, "in the Indian country," refer to the residence of the Indian excepted from the operation of the law, or do they define the *locus in quo* of the act prohibited? In other words, does the law only prohibit the traffic of liquor in the *Indian* country, by any person except an Indian, or does it prohibit, (with the same exception) the traffic with any Indian under the charge of a superintendent or agent, whether in the Indian country or not?

Under the law of June 30th, 1834, (4 U. S. Stat. 732), the prohibition extended only to the Indian country. By the amendatory act of February 13th, 1862, (12 U. S. Stat. 339), the words "in the Indian country" were stricken out, thus making the prohibition apply to any Indian under the charge of a superintendent or agent, whether in the Indian country or not. Now these two acts of 1834, and 1862 have been repealed by the Revised Statutes, and section 2139, which we are called upon to construe, appears to be the only law in existence prohibiting the selling, bartering, or giving of liquor to Indians. There is but little to aid us in ascertaining the intention of the law-making power in this act, except the context and the phraseology of the law itself.

The chapter under which this section is found is headed: "*Government of Indian country.*" The head and marginal notes to this section read, "*Penalty for selling spirituous liquors in Indian country.*" The first paragraph of this section says: "No ardent spirits shall be introduced under any pretence into the Indian country."

By an examination of the various provisions of this chapter, it will be seen, that the whole tenor of the law is to regulate and govern traffic with the Indians in the Indian country. The punctuation of this section also conveys the same idea, there being a comma before and after the words, "except an Indian," and I construe those words as if they were in parenthesis.

It appears to me, that the section under considereration was intended to prohibit the selling, giving, or bartering of spirituous liquors or wine to an Indian in the Indian country, and not elsewhere. That the words "in the Indian country," refer to the locality of the offence, and not to the habitation of the Indian excepted from the penalty of the act. We observe in section 2135, prohibiting other kinds of traffic, a similar exception of an Indian.

It was evidently the intention of the legislature to prevent not only the introduction of liquor into the Indian country, but also the selling or giving it to the Indian after it had been introduced, by every person except an Indian.

The exception prevents the application of the law to an Indian, except so far as his liquor would be subject to seizure under the provisions of the next section. So it would seem the "untutored child of the forest" might traffic in liquor without limit, subject only to the inconvenience of seizure and confiscation.

If the other view is taken of this law, and the words "in the Indian country," be applied to the domicile of the Indian excepted, it would result that a special privilege is granted to an Indian in the Indian country, over an Indian in any other locality. The former could carry on this traffic with all the tribes and nations of Indians, while the latter would be prohibited. And this further question would then arise: Would the Indian residing in the Indian country be limited to traffic in that country, or would he carry this privilege about with him, and have a roving commission to deal in whiskey anywhere he pleased, provided the Indian country was his domicile? In brief, would it except an Indian living in the Indian country, or an Indian selling in the Indian country from the operation of the law? Or must the excepted Indian both reside and carry on the traffic in the Indian Country?

This law is worderfully and fearfully made, and like the grace of God "it passeth all understanding." We find ourselves groping in darkness when we accept any other theory than the one first suggested, and upon which we rest our decision.

But we are met with the argument that under this construction dealers in liquor may set up in the traffic on the borders of the Indian country with impunity, and thus defeat the object and purpose of the law. Now if we are to look beyond the interpretation of the act of Congress to the effect likely to result, there are two answers to this objection.

First. If his business *introduced or attempted to introduce* liquor into the Indian country the penalty of the law would reach him. Whether selling a drink of liquor to an Indian who crossed the border for that purpose would be introducing liquor into the Indian country is a question in metaphysics too abtruse for me to solve, until driven to it by dire necessity. Second. There is a statute law of this state (Gen. Stat. 524) which in stringent terms prohibits this traffic with the Indians, and which is ample to reach malefactors in the case referred to, and it is eminently proper that the laws of the state should denounce and punish those acts committed within its limits, which tend to do harm to its citizens, and to subvert the peace and good order of the community. The people of the state lying contiguous to the Indian country, are more immediately affected by this traffic within its borders than are the people of the country at large.

It is apparent why Congress should legislate against the traffic in the Indian country, which is under the immediate jurisdiction of Congress, and yet not interfere when the state jurisdiction intervenes. It is the spirit and theory of the general government to leave to state legislation such matters as are properly cognizable by the local government.

It has been decided by Mr. Justice Miller, U. S. v. Ward, 1 Woolw. C. C. 17, that the jurisdiction of the court of this state extends over all Indian reservations within the limits of the state, unless by treaty stipulation such reservations were not to be included within the state limits. To use the words of the learned judge: "All territory which was not covered by such treaties, was included within the state within its jurisdiction, and within its territory, and this irrevocably, unqualifiedly and exclusively." Again he says: "It can not be said of the new state of Kansas that she stands upon an equal with the original states in all respects whatever, * * * if Congress can without her consent exclude her from the right and the power to enforce the laws which she has made for the protection of the lives, persons and property of her citizens, on any portion of her soil."

The Indian country, as defined by the act of 1834, was all that vast and boundless territory lying west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas. As the several new states which have been carved out of this vast territory have been admitted into the Union on an equal footing with the original states, under the principle established by Justice Miller in the Ward case, this expansive territory has been greatly diminished, and from what was originally the Indian country must now be excluded the new states taken therefrom, and all Indian reservations included within the limits and jurisdiction of such states. Under this rule it is not unlikely, that such Indian reservations within the borders of this state, as were by a treaty stipulation to be excluded from states limits and state jurisdiction, are still in the Indian country, and within its jurisdiction. In this case, however, it is not charged that the liquor was sold on such a reservation or on any reservation whatever, and therefore it is not necessary to decide this point.

The great body of the Indian tribes have been removed to the Indian country, and there is but little reason to apprehend that the state of Kansas can not amply protect herself from the liquor traffic with the few remnants of tribes still remaining within her borders.

The motion to quash the indictment must be allowed.

Contract—Broker—Memorandum under the Statute of Frauds.

BUTLER v. THOMSON, *ET AL.*

Supreme Court of the United States, October Term, 1875.

The following memorandum was made and signed by the brokers negotiating a sale: "New York, July 10, 1867. Sold for Messrs. Butler & Co., Boston, to Messrs. A. A. Thomson & Co., New York, seven hundred and five (705) packs first quality Russia sheet-iron, to arrive at New York, at twelve and three-quarters (12 3-4) cents per pound, gold, cash, actual tare. Iron due about Sept. 1, '67. White & Hazard, brokers." *Held* that this was a sufficient contract within the statute of frauds. The memorandum expressing that the iron had been sold imported necessarily that it had been bought. Being signed by the agent of the buyer and seller, it was obligatory on both parties.

In error to the Circuit Court of the United States for the Southern District of New York.

Mr. Justice HUNT delivered the opinion of the court.

The plaintiff alleged that on the 11th day of July, 1867, he bargained and sold to the defendants a quantity of iron thereafter to arrive, at

prices named, and that the defendants agreed to accept the same and pay the purchase-money therefor; that the iron arrived in due time, was tendered to the defendants, who refused to receive and pay for the same, and that the plaintiff afterwards sold the same at a loss of $6,581, which sum he requires the defendant to make good to him. The defendants interposed a general denial.

Upon the trial the case came down to this: The plaintiff employed certain brokers of the city of New York to make sale for him of the expected iron. The brokers made sale of the same to the defendants at 12 3-4 cents per pound in gold, cash.

The following memorandum of sale was made by the brokers, viz:

"NEW YORK, July 10, 1867.

"Sold for Messrs. Butler & Co., Boston, to Messrs. A. A. Thomson & Co., New York, seven hundred and five (705) packs first quality Russia sheet-iron, to arrive at New York at twelve and three-quarters (12 3-4) cents per pound, gold, actual tare.

"Iron due about Sept. 1, '67.

"WHITE & HAZZARD, Brokers."

The defendants contend that, under the statute of frauds of the state of New York, this contract is not obligatory upon them. The judge before whom the cause was tried at the circuit concurred in this view, and ordered judgment for the defendants. It is from this judgment that the present review is taken.

The provision of the statute of New York upon which the question arises (2 R. S. 136, § 3) is in these words: "Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void, unless (1) a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby; or (2) unless the buyer shall accept and receive part of such goods, or the evidences, or some of them, of such things in action; or (3) unless the buyer shall at the time pay some part of the purchase-money."

The 8th section of the same title provides that "every instrument required by any of the provisions of this title to be subscribed by any party may be subscribed by the lawful agent of such party."

There is no pretence that any of the goods were accepted and received, or that any part of the purchase-money was paid. The question arises upon the first breach of the statute, that a memorandum of the contract shall be made in writing, and be subscribed by the parties to be changed thereby.

The defendants do not contend that there is not a sufficient subscription to the contract. White & Hazzard, who signed the insturment, are proved to have been the authorized agents of the plaintiff to sell, and of the defendants to buy, and their signature, it is conceded, is the signature both of the defendants and of the plaintiff.

The objection is to the sufficiency of the contract itself. The written memorandum recites that Butler & Co. had sold the iron to the defendants at a price named, but it is said there is no recital that the defendants had bought the iron. There is a contract of sale, it is argued, but not a contract of purchase.

As we understand the argument, it is an attack upon the contract, not only that it is not in compliance with the statute of frauds, but that it is void upon common-law principles. The evidence required by the statute to avoid frauds and perjuries, to wit, a written agreement, is present. Such as it is, the contract is sufficiently established and possesses the evidence of its existence required by the statute of frauds.

The contention would be the same if the articles sold had not been of the price named in the statute, to wit, the sum of fifty dollars.

Let us examine the argument. Blackstone's definition of a sale is "a transmutation of property from one man to another in consideration of some price." 2d Bl. 446. Kent's is, "a contract for the transfer of property from one person to another." 2 K. 615. Bigelow, Ch. J., defines it in these words: "Competent parties to enter into a contract, an agreement to sell, the mutual assent of the parties to the subject-matter of the sale, and the price to be paid therefor." Gardner v. Lane, 12 Allen, 39, 43. A learned author says: "If any one of the ingredients be wanting, there is no sale." Atkinson on Sales, 5. Benjamin on Sales, p. 1, note and p. 2, says: "To constitute a valid sale there must be, 1, parties competent to contract; 2d, mutual assent; 3d, a thing, the absolute or general property in which is transferred from the seller to the buyer; 4th, a price in money, paid or promised."

How, then, can there be a sale of 705 packs of iron unless there be a purchase of it? How can there be a seller unless there be likewise a purchaser? These authorities require the existence of both. The essential idea of a sale is that of an agreement or meeting of minds by which a title passes from one and vests in another. A man can not sell his chattel by a perfected sale, and still remain its owner. There may be an offer to sell, subject to acceptance, which would bind the party offering and not the other party until acceptance. The same may be said of an optional purchase upon a sufficient consideration. There is also a class of cases under the statute of frauds where it is held that the party who has signed the contract may be held chargeable upon it, and the other party, who has not furnished that evidence against himself, will not be thus chargeable. Unilateral contracts have been the subject of much discussion, which we do not propose here to repeat. In Thornton v. Kempster, 5 Taunton, 788, it is said: "Contracts may exist which, by reason of the statute of frauds, could be enforced by one party although they could not be enforced by the other party. The statute of frauds in that respect throws a difficulty in the way of the *evidence*. The objection does not interfere with the substance of the contract, and it is the negligence of the other party that he did not take care to obtain and preserve admissible evidence to enable himself also to enforce it."

The statute of 29 Car. 2, c. 3, on which this decision is based, that "no contract for the sale of goods, wares and merchandise for price of £10 sterling, or upwards, shall be allowed to be good except the buyer," &c., is in legal effect the same as that of the statute of New York already cited. See Justice v. Lang, 42 N. Y. 203, that such is the effect of the statute of New York.

The case before us does not fall within this class. There the contract is signed by one party only. Here both have sighed the paper, and if a contract is created, it is a mutual one. Both are liable, or neither.

Under these authorities it seems clear that there can be no sale unless there is a purchase, as there can be no purchase unless there be a sale. When, therefore, the parties mutually certify and declare in writing that Butler & Co. have sold a certain amount of iron to Thomson & Co. at a price named, there is included therein a certificate and declaration that Thomson & Co. have bought the iron at that price.

In Radford v Newell, 3 L. R. (C. P.) 52, the memorandum was in these words: "Mr. H., 32 sacks culasses at 39s. 280 lbs., to wait orders," signed John Williams. It was objected that it was impossible to tell from this memorandum which party was the buyer and which was the seller. Parol proof of the situation of the parties was received, and that Williams was the defendant's agent and made the entry in the plaintiff's books. In answer to the objection the court say: "The plaintiff was a baker, who would require the flour, and the defendant a person who was in the habit of selling it," and the plaintiff recovered. It may be noticed, also, that the memorandum in that case was so informal as to contain no words either of purchase or sale, (Mr. H., 32 sacks culasses at 39s. 280 lbs., to wait orders), but it was held to create a good contract upon the parol evidence mentioned.

The subject of bought and sold notes was elaborately discussed in the case of Sievenright v. Archibald, 6 Eng. L. & Eq. R. 286; S. C. 17 Q. B. 103; Benjamin on Sales, p. 224, and § 290. There was a discrepancy in that case between the bought and sold notes. The sold note was for a sale to the defendant of "500 tons Messrs. Dunlop, Wilson & Co.'s pig-iron." The bought note was for "500 tons of Scotch pig-iron." The diversity between the bought and sold notes was held to avoid the contract. It was held that the subject of the contract was not agreed upon between the parties. It appeared there, and the circumstance is commented on by Mr. Justice Patteson, that the practice is to deliver the bought note to the buyer, and the sold note to the seller. He says: "Each of them, in the language used, purports to be a representation by the broker to the person to whom it is delivered, of what he, the broker, has done as agent for that person. Surely the bought note delivered to the buyer can not be said to be the memorandum of the contract signed by the buyer's agent in order that he might be bound thereby, for then it would have been delivered to the seller, not to the buyer and *vice versa* as to the sold note."

The argument on which the decision below, of the case we are considering, was based, is that the contract of sale is distinct from the contract of purchase; that to charge the purchaser the suit should be brought upon the bought note, and that the purchaser can only be held where his agent has signed and delivered to the other party a bought note, that is an instrument expressing that he has bought and will pay for the articles specified. Mr. Justice Patteson answers this by the statement that the bought note is always delivered to the buyer and the sold note to the seller. The plaintiff here has the signature of both parties and the counterpart delivered to him, and on which he brings his suit is, according to Mr. Justice Patteson, the proper one for that purpose, that is, the sold note.

We do not discover in Justice v. Lang, reported in 42 N. Y. 493, and again in 52 N. Y. 323, anything that conflicts with the views we have expressed, or that gives material aid in deciding the points we have discussed.

The memorandum in question, expressing that the iron had been sold, imported necessarily that it had been bought. The contract was signed by the agent of both parties, the buyer and the seller, and in our opinion was a perfect contract, obligatory upon both the parties thereto.

The judgment must be reversed, and the cause remanded to the circuit court for a new trial.

Right of Assignee of Note in Mortgage given to Secure it.

LOGAN v SMITH *ET AL.*

Supreme Court of Missouri, May, 1876.

Present, Hon. DAVID WAGNER, WM. B. NAPTON, T. A. SHERWOOD, WARWICK HOUGH, Judges.

Promissory Notes—Holder for Value.—The endorsee of a promissory note, who takes the same as collateral security for a debt created at the time, relying upon the note as his security, and with notice of no equities between the original parties, is a holder for value. Goodman v. Simonds, 19 Mo. 106, *distinguished.*

Mortgage—Right of Assignee of Note therein.—The endorsee of a negotiable note, who takes it discharged of the equities to which it was subject in the hands of the payee, acquires the same right in a mortgage given to secure it which the payee would have had if no equities had existed against the note. "He takes the mortgage as he takes the note." Linville v. Savage, 58 Mo. 248, *distinguished.*

A. H. Vories and *W. S. Greenlee*, for appellant; *J. D. Strong* and *Vinton Pike*,, for appellee.

HOUGH, J., delivered the opinion of the court.

This was a proceeding to foreclose a mortgage under the statute.

On the 17th day of January, 1870, Samuel F. Cowan sold and conveyed by warranty deed to the defendant Smith, the land described in the mortgage sought to be foreclosed, for the sum of $3,000. The defendant paid $1,800 in cash, and for the remaining $1,200 made and delivered his negotiable promissory note of that date, to said Cowan, payable on the 25th day of December, 1870, and to secure the payment of the same executed said mortgage. At the date of said sale there was on record a mortgage on said land, made by Cowan on the 22d day of December, 1869 to one Floyd, from whom Cowan had purchased said land, to secure the payment of two notes of $770 each, for unpaid purchase-money, dated August 30th, 1869, and due respectively on the 1st day of March, and on the 25th day of December, 1870. The defendant Smith had no knowledge of this mortgage at the time of his purchase, and he first learned of its existence on the 25th day of March, 1870, when Floyd notified him that Cowan had made default in the payment of his first note. Smith then saw Cowan and it was then agreed between them that Smith should raise $500 and Cowan should raise the balance necessary to pay off said note. In pursuance of said agreement Smith paid $500 to Floyd on the 25th day of May, 1870, which was credited on Smith's note to Cowan, but Cowan failed to raise any money whatever. It was then further agreed between them that Smith should become responsible on the Floyd notes to the extent of the balance on his note to Cowan for $1,000, not then due, and thus extinguish his indebtedness to Cowan. Cowan then stated to him that the mortgage had not been recorded, and should not be, but the note was not surrendered. Time was given on the balance of the first note, as shown by the date of payment, and Smith subsequently paid the whole of the Floyd notes and had satisfaction of the mortgage entered of record. On the 7th day of August, 1870, the plaintiff Logan loaned to Cowan the sum of $1,200, taking a note from him therefor, and a transfer of Smith's note for $1,200 as collateral security, being informed by Cowan that it was secured by the mortgage before mentioned. This mortgage was never recorded, nor was it delivered to Logan, and it appears from the evidence to have been lost. Soon after this transaction Cowan became insolvent. Smith was notified of the transfer of his note to the plaintiff, a short time prior to its maturity, and before any payments were made by him on the Floyd notes, other than that of $500 on May 25th, 1870, which was endorsed on the note; but as we infer from the record that Smith entered into some personal obligation to Floyd to the extent of his liability to Cowan, we shall not regard the payments thereafter made by him as affecting his rights. There was no evidence of any knowledge on the part of Logan, or of notice of any kind to him of the arrangement made by Smith to discharge his debts to Cowan by paying the amount thereof to Floyd. The circuit court rendered judgment for the plaintiff on the note for the balance due, and interest, and for foreclosure of the mortgage.

On the foregoing facts it is contended by the defendant that the plaintiff was not entitled to judgment; first, because he could not be regarded as a *bona fide* holder of the note, inasmuch as he took it as collateral security; and, second, because the mortgage was not negotiable, and the plaintiff could not acquire by the simple transfer of the note, any greater right to enforce the mortgage-security than Cowan had.

Objection is made to the form of the judgment, but we think it is without force.

In support of the first position, we have been referred to the case of Goodman v. Simonds, 19 Mo. 106. That case goes only to the extent of declaring that one who takes negotiable paper as collateral security for a pre-existing debt will hold it subject to all the equities existing between the original parties. It is otherwise in the case at bar. Logan took Smith's note as collateral security, not for a pre-existing debt, but for a debt created at the time, and on the faith thereof, with notice of no equities, and he thereby, undoubtedly, became a holder for value. 1 Parsons' Notes and Bills, 224.

The second point made by the defendant presents a more intricate question.

The plaintiff had an undoubted right to collect the whole amount due on the note transferred to him by Cowan, regardless of the existence of any right in the defendant at the time of the transfer to have it discharged, in the manner agreed upon between himself and Cowan. The question presented is, whether by the transfer of the note, the mortgage security held by Cowan also passed to the plaintiff divested of all the equities effecting it between the original parties. The defendant contends on the authority of Linville v. Savage, 58 Mo. 248, that it did not.

It is well settled that unless the mortgage has been in some way separately extinguished, as by release, for instance, the transfer of the note carries the mortgage with it, as an incident. The mortgage itself is not a negotiable instrument, and can not be transferred as such, but the endorsee of the note acquires a right to the security afforded by it, by reason of the stipulation contained in the mortgage itself, that the property conveyed by it might be subjected to the payment of the full amount, which the payee or any endorser should be entitled to recover as the holder of the note. In the language of Justice Swayne, in Carpenter and Lougan, 16 Wall. 271-3: "The contract as regards the note was, that the maker should pay it at maturity to any *bona fide* endorsee without reference to any defence to which it might have been liable in the hands of the payee. The mortgage was conditioned to secure the fulfillment of that contract."

The plaintiff here, being unaffected by the agreement between Cowan and Smith, has the same rights in the mortgage which Cowan would have had at the date of the transfer, if no such agreement had ever been made. To state the matter generally, the endorsee of a negotiable note, who takes it discharged of the equities to which it was subject in the hands of the payee, acquires the same right in a mortgage given to secure it which the payee would have had if no equities had existed against the note.

We do not understand the case of Linville v. Savage to deny this. The spirit of that case is, that the endorsee for value before maturity, of a negotiable note which was subject to no equities in the hands of the payee at the time of the transfer, can not acquire any greater right in a mortgage given to secure it than the payee had. That is, if the land conveyed by the mortgage was subject to prior liens in favor of a third party (which would constitute of course no equity between the immediate parties to the mortgage), the endorsee of the note would only acquire the right to enforce his claim against the land, subject to such liens whether he had notice of them or not.

In the present case there are no equities affecting the character or value of the security itself, and the only question is, whether the security passed to the plaintiff as endorsee of the note. In Linville v. Savage, it was conceded that the security passed to the holder of the note, but the question was, how much security did the mortgage afford? Was it subject to a prior lien in favor of a third party, as against the endorsee of the note? If the land conveyed in the mortgage made by Smith to Cowan had been at the institution of the present suit subject to a vendor's lien in favor of Floyd, of which Cowan had notice and the plaintiff had not, and the plaintiff were seeking to enforce his mortgage as a prior security, because he took without notice of such lien, the precise question passed upon in Linville v. Savage, would be presented. Such, however, is not the case.

The plaintiff being a *bona fide* holder of the note in suit, and as such entitled to the benefit of the mortgage made to secure it, the judgment of the circuit court was right, and will therefore be affirmed.

Judges Wagner and Napton concur. Judge Sherwood concurs in the result. Judge Vories absent.

NOTE.—For a very full and valuable consideration of the rights of a holder of a negotiable instrument as collateral security, see 1 Daniel on Negotiable instruments, 616 *et seq.* and see also Redf. and Big. Lead. Cas., Bills and Notes 186, and note. Although involved in some confusion, the tendency of the decision is to invest the *bona fide* holder of a negotiable instrument, *endorsed* to him as collateral security for a pre-existing debt, with all the rights of a holder for value actually paid.

The principal case very unnecessarily, as we think, overrules or rather ignores Potter v. McDowell, 43 Mo. 93, where a deed of trust was set aside as against *bona fide* holders of the notes which it was given to secure, on the ground that the deed was fraudulent as to creditors. In that case it was said: "There is not sufficient evidence to charge the holders of the notes with knowledge of the fraud. Being innocent holders, their title to them must be considered perfect. The *bona fide* endorsee of negotiable paper received before maturity is not affected by any latent equities between the original parties to it. This, however, is an incident of its negotiability. The endorsement of the notes gave the defendants no legal interest in the property. Their lien is not a legal lien; it is an equitable one raised by implication. A mortgagee holds the legal title in this state, and may maintain ejectment on it. When the note or bond which the mortgage is given to secure is endorsed or assigned, the mortgagee becomes the trustees for the person holding it. This is an equitable relation only; his legal title still exists. The mortgage is governed by the law relating to real property, and the notes by the law merchant." Without expressing any opinion as to the merits of this controversy, we refer to an interesting article entitled The Negotiable Character of Mortgages, 2 CENT. LAW JOURNAL, 501, where the authorities are very fully cited. And see also Murry v. Jones, 50 Ga. 109; Hull v. Swarthout, 29 Mich, 249; 1 Daniel on Negotiable Instruments, 628, §§ 834, 835.

We do not think it was necessary in the principal case to pass on this question, for it was not necessary to invoke the immunities extended to the *bona fide* holder of negotiable paper in order to justify the judgment for the plaintiff. The defendant's legal right against Cowan grew out of the covenants in his deed. He had no defence at law against either the note or the mortgage. And his right to an equitable set-off, even as against Cowan only, arose from Cowan's insolvency, which it seems occurred after the transfer of the note to plaintiff; hence, at the time the note was transferred to plaintiff, defendant had no defence either legal or equitable against it. But more than all that. When the defendant went into a court of equity to defend his note upon the right growing out of the covenant in his deed, he would be met by the clear legal right of the plaintiff, backed by a superior equity. The prior incumbrance was on record when the defendant made his purchase, and the law presumes, and the plaintiff had the right to presume, that he had notice of it. The exercise of the most ordinary prudence in examining the record of the title he was purchasing would have put him in possession of all the facts. The plaintiff might well act upon the presumption that the defendant had proceeded with ordinary caution and prudence, and that he looked to the covenants against incumbrance in his deed for protection against the prior mortgage, if he was required to take notice of it, and if he was, the defendant surely must have been. The whole trouble, as far as plaintiff and defendant were concerned, grew out of defendant's negligence, and he alone ought to suffer the loss if any, consequent thereon. This case is on all fours with Kittridge v. Batchelder, 47 Vt. 64, and which was decided in consonance with the views expressed above. M. A. L.

Life Insurance—Policy to Married Women on Life of Husband—Missouri Legislation Construed.

SMITH v. MISSOURI VALLEY LIFE INS. CO.

United States Circuit Court, District of Kansas.

Before Hon. JOHN F. DILLON, Circuit Judge.

1. Construction of Statute.—The plaintiff, a married woman, domiciled in Missouri, through her husband applied for and received from a Kansas life insurance company, doing business in Missouri, a policy of insurance on the life of her husband of which the annual premium exceeded $300; the policy, by its terms, was payable on the death of the husband *to the plaintiff*. *Held*, that under the Missouri statute, (2 Wagner Stat. p. 936, sec. 15), the policy was not void because the annual premium exceeded $300.

2. Right of Action.—The right of action was in the plaintiff and not in the administrator of the husband.

3. Defence.—The company could not set up, to defeat the right of action in the plaintiff, that all or some part of the recovery money, under the statute of Missouri, lay in trust for the estate or creditors of the husband.

The court finds from the evidence the facts to be as follows: 1st. That the defendant is a corportion existing under the laws of the state of Kansas; that on June 30th, 1871, the plaintiff made an application at St. Louis, in the state of Missouri, to the defendant for a policy of insurance, on the life of her husband, Henry Smith, for the benefit of herself; such application signed Augusta S. Smith by Henry Smith was soon after delivered to the defendant, and on July 3rd, 1871 accepted by it, and the policy of insurance in suit was written, and by the president and secretary of the defendant signed, and the corporate seal affixed at its home office in Leavenworth, state of Kansas, and was afterwards countersigned, and delivered by the defendant's agent in St. Louis, state of Missouri. All premiums paid were paid in St. Louis, and all premium receipts were there countersigned and delivered. The policy by its terms is payable on the death of the husband "to Augusta S. Smith" (the plaintiff).

2nd. At the time of making such application, and delivery of such policy, the plaintiff and said Henry Smith were residents of St. Louis, in the state of Missouri, and citizens thereof, and the plaintiff has ever since continued to be such resident, and said Henry Smith continued to be such resident and citizen until his decease, in 1874.

3rd. That the insured, Henry Smith, died in St. Louis on the 6th day of October, 1874, and the plaintiff soon after gave notice of death, and served the proofs of the loss required by the said policy.

4th. That said Henry Smith left a last will and testament, appointing the plaintiff executrix thereof, which will and testament was on the 24th day of October, 1874, proved and admitted to probate, by the probate court of St. Louis county, state of Missouri, in which county St. Louis is situate.

That the plaintiff after citation by such probate court refused to take letters testamentary or administer said will, and thereupon, and on the 18th day of November, 1874, said probate court granted letters of administeration with the will of Henry Smith deceased, to George E. Leighton and Lewis B. Parsons, then and still residents of the city of St. Louis and citizens of the state of Missouri, and said Leighton and Parsons qualified as such administrators on the 18th day of November, 1874, and have ever since been such administrators, and now claim, but not as parties to this suit, to be the owners of the policy of insurance sued on, and as such administrators to be entitled to recover the money due under the said policy of insurance.

5th. That said Henry Smith was insolvent at the time of his death, and his estate is insolvent, but was not insolvent when the policy was issued, and for a long time afterwards. It does not appear whether the premiums were paid out of the husband's, or the wife's estate.

6th. That at the time the policy sued on was issued, the life of said Henry Smith was insured in the sum of $21,000 in other insurance companies in which the plaintiff was the beneficiary, which policies were in force at the time of his decease, and the plaintiff has commenced suits in New Jersey and Connecticut, for the recovery of the amount of each of them, which suits are now pending, and are contested by the companies.

7th. That the annual premium paid on the policy in suit exceeds the sum of three hundred dollars.

8th. That chapter 115 of the statutes of the state of Missouri (being chapter 94 of Wagner Statutes) entitled "Married Women," section 15, of which is the words following: "Section 15. It shall be lawful for any married woman by herself and in her name, or in the name of any third person, with his assent, as her trustee, to cause to be insured for her sole use, the life of her husband, for any definite period, or for the term of his natural life; and in case of her surviving her husband, the sum or net amount of the insurance becoming due and payable by the terms of the insurance, shall be payable to her, and for her use, free from the claims of her husband, or any of his creditors, but such exemption shall not apply when the amount of premium annually paid shall exceed the sum of three hundred dollars," was, at the time of making such application and delivery of such policy of insurance sued on, and still is in full force and effect. And that section 18 of the same chapter in the words following:

"Section 18. Any policy of insurance heretofore or hereafter made by any insurance company upon the life of any person, expressed to be for the benefit of any married woman, whether the same be effected by herself, or by her husband, or by any third person in her behalf, shall enure to her separate use and benefit; and that of her children, if any, independently of her husband and of his creditors and representatives, and also independently of such third persons effecting the same in her behalf, his creditors and representatives; and a trustee may be appointed by the circuit court for the county in which such married woman resides, to hold and manage the interest of any married woman in any such policy, or the proceed thereof," was at the time of making such application for insurance and issue and delivery of such policy, and still is in force.

9. It is admitted that if the laws of Kansas apply to and govern the case, the plaintiff is entitled to recover.

J. C. Douglass, for the plaintiff; *Hurd* and *Monroe*, for the defendant.

DILLON, circuit judge.—The defence is that this is a Missouri transaction that under the statute of that state (2 Wagner Stats. 936, sec. 15), the policy is void *in toto*, as the annual premium exceeded $300; or if this be not so, the right of action is in the administrators of the husband and not in the plaintiff; and that the plaintiff is neither the legal owner of the right of action, nor "the real party in interest," and hence can not maintain this suit.

I concede without enquiry, for the purposes of the case, that the Missouri statute applies, and will govern in determining the validity and effect of the contract.

The entire chapter in which this provision occurs is one expressly designed to enlarge the rights of married women, and should be construed to carry out its purpose. A married woman always had an insurable interest in the life of her husband, and if she paid the premiums for the risk out of her own estate, she could insure his life for any sum upon which she and the insuree might agree. And a husband who is free of debt may insure his own life for his wife's benefit for any sum he may choose. It is a mode and a favorite mode for making provision for wife and children. The statute of Missouri (sec. 15, *supra et seq.*), is not entirely free from obscurity, but the construction placed upon it by Judge Treat of the United States District Court seems reasonable, viz: that under its provisions an insolvent husband may withdraw from his estate for this purpose, not exceeding $300 annually, where the beneficial interest in the policy is in the wife. If the insolvent husband pays more, the policy is not void, but the wife if she recover, might hold in part in trust for the creditors as represented by the husband's administrator, or assignee in bankruptcy. *In re* Yeager, 8 West. Ins. Review, 378; Charter Oak Co. v. Brant, 47 Mo. 419; McComas v. Covenant, etc., Ins. Co., 56 Mo. 573.

The case before the court, in any view of the Missouri statute as to the respective rights of the plaintiff and the creditors of the husband, is easy of solution. The agreement of the defendant in the policy is, "to pay the amount assured to Augusta S. Smith." This gives her the right to sue upon the policy in her own name. If she recovers, it is a different question whether she may not hold the proceeds of the recovery or some part thereof for the benefit of the estate of her husband if necessary to pay debts. The company can not set up such supposed rights in others, to defeat an action on the policy. The plaintiff, having the legal title, may maintain the action, and this will protect the company from another suit, and in the event of a recovery by her, the equities of others, if any exist, which I do not decide, can be adjusted in an action between them and the plaintiff. The administrators of the husband are not here insisting upon their rights, if they have any, and the company can not set up rights for them, and on its motion, introduce into this suit matters with which it has no concern.

I am of opinion the plaintiff is entitled to recover.

JUDGMENT FOR PLAINTIFF.

Constitutional Law—Amendatory Bankrupt Act of 1873—Exemptions.

IN RE SMITH.

United States Circuit Court, Northern District of Georgia.

Before Hon. W. B. WOODS, Circuit Judge.

1. Act of 1873 Constitutional.—The amendatory bankrupt act of 1873, (17 Stat. 577) which enacts "that the exemptions allowed the bankrupt, etc., shall be the amount allowed by the constitution and laws of each state, respectively, as existing in the year 1871; and that such exemptions be valid against debts contracted before the adoption and passage of such state constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any state court, any decision of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding," is *uniform* and hence constitutional.

Argument 1. A bankupt law which adopts the exemption from execution prescribed by the laws of the several states, is uniform so far as such exemptions are concerned. The exemptions may differ widely in different states, but still the rule is uniform, namely, to subject to the payment of the bankrupt's debts all his property not exempted by the law of the state wherein he resides.

Argument 2. Congress may adopt the state laws, at a particular date, in reference to exemptions, and the legislation is uniform, although the laws in some of the states may afterwards be repealed by the legislature, or declared null by the courts.

2. Presumption in favor of Constitutionality.—In passing upon the constitutionality of an act of Congress, all the presumptions are in favor of the law, and the courts will not pronounce a law unconstitutional, unless its incompatibility be clear, decided and inevitable.

Peeples & Howells, for petitioner; *Boynton & Desmuke, contra.*

WOODS, circuit judge.—This is a petition filed to reverse a decree of the district court in bankruptcy.

The facts of the case appear from the pleadings and evidence to be as follows: John W. A. Smith was adjudged a bankrupt by the District court in the Northern District of Georgia, on the 3d day of June, A. D. 1873. At the date of the adjudication the petitioner was the judgment-creditor of the bankrupt in the sum of $———. The judgment bore date prior to the 21st day of July, 1868, when the present constitution of Georgia went into effect, and was a lien upon the real estate of the bankrupt.

By an act passed prior to and in force in 1864, and in force when the debt due to petitioner was contracted, and which remained in force until the adoption of the constitution of 1868, there was allowed to the head of a family, as a homestead, exempt from execution, fifty acres of land for each of his children under sixteen years of age.

By the constitution of 1868, and by an act of the legislature, passed Oct. 3d, 1868, to carry the constitutional provision into effect, there was allowed to the head of a family a homestead of realty, exempt from execution, of the value of $2,000 (in specie).

The judgment of the petitioner against the bankrupt was duly proven and allowed as a debt against his estate prior to the 30th of June, 1874. On that day, the assignee in bankruptcy set off to the bankrupt his homestead, according to the provisions of the act of 1864, namely: ninety acres of land, that being 50 acres and 5 acres in addition thereto for each child of the bankrupt under sixteen years of age. The bankrupt claimed that he was entitled to have assigned to him the homestead allowed by the constitution of 1868, and the act of Oct. 3d, 1868, to wit: realty to the value of $2000 (in specie). He therefore filed with the register his objections to the assignment made by the assignee. The register referred the question thus raised, with his opinion thereon, sustaining the objections of the bankrupt against the assignment, to the district judge, who also sustained the objections of the bankrupt, and held that he was entitled to have his homestead set off, under the provisions of the act of Oct 3, 1868, notwithstanding the fact that the debt of the objecting creditor was contracted and the judgment therefor, a lien upon the realty of the bankrupt, before the change in the homestead law.

To review and reverse this decree of the district judge, is the purpose of the petition.

The case turns upon the constitutionality of the act of Congress approved March 3, 1873, entitled "An act to declare the true intent and meaning of the act approved June 8, 1872, amendatory of the general bankrupt law. 17 Statute, 577, Rev. Statute, sec. 5045. This statute enacts, "that the exemptions allowed the bankrupt * * * shall be the amount allowed by the constitution and laws of each state, respectively, as existing in the year 1871, and that such exemptions be valid against debts contracted before the adoption and passage of such state constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any state court, any decision of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding."

To put the question clearly in view, it must be stated that after the adoption of the constitution of 1868, and the passage of the act of Oct. 3, 1868, to carry the exemptions provided for by the constitution into effect, the Supreme Court of Georgia at its January term, 1873, in the case of Jones v. Brandon, 48 Ga. 593, decided that the provisions of the constitution and of the law, as far as they increased the exemption of property from execution, as against debts contracted before their adoption, was in conflict with that provision of the constitution of the United States which declares "No state shall * * pass * * any law impairing the obligation of contracts (Constitution of the U. S., Art. 1, sec. 10,) and were, therefore, null and void. The same decision had, in effect, been previously made by the Supreme Court of the United States in the case of Gunn v. Barry. 15 Wallace, 610. It follows from this state of the law, as declared by the courts, that when the assignee undertook to set off the homestead of the bankrupt on the 30th of June, 1873, he was not authorized to set apart, as against Whitefield's Adm'r, any greater amount of realty than was authorized by the act of 1864, except as he derived his authority from the act of Congress of March 3, 1873, above cited. In other words, there was no valid and operative state law by which the bankrupt could claim that he was entitled to a homestead of the value of $2,000 (in specie) as prescribed by the constitution and law of 1868.

The question, therefore, whether the act of Congress, March 3, 1873, is constitutional, is vital to the decision of this case.

The objection to this act is not that it impairs the obligation of contracts, for Congress is not prohibited by the constitution from passing such a law. Evans v. Eaton, Peters C. C. 328; Sallerbe v. Matthewson, 2 Peters, 330; Bloomer v. Stalley, 5 McLean, 158. Besides the power expressly given to Congress "to establish uniform laws on the subject of bankruptcies throughout the United States," implies the power to impair the obligation of contracts. Stephens v. Griswold, Wall. 603; The Legal Tender Cases, 12 Wall. 457.

The ground of objection is that the law is not uniform as required by the constitution of the United States. In my judgment, a bankrupt law which adopts the exemption from execution prescribed by the laws of the several states is uniform so far as such exemptions are concerned. The exemptions may differ widely in different states, but such an act would apply a uniform rule, namely, to subject to the payment of the bankrupt's debts all his property not exempted by the laws of the state wherein he resided. Upon this ground the original provision of the bankrupt, which adopted the state exemption laws in force in 1864, was declared to be uniform. *In re* Beckerford, 1 Dillon, 45.

But it is said that the act of 1873 does not adopt the exemption laws as they exist in the states, but gives effect to all those which were upon the statute books of the states in 1871, even though some of them may have been declared unconstitutional, invalid and inoperative by the state courts; that the operation of the act of Congress is therefore not uniform, because in some states the exemption allowed by the state laws is followed, while in others exemptions are permitted which the state laws, as interpreted by the courts, do not allow.

The same objection would apply to the original bankrupt act of 1867. That declared that the exemptions allowed by the state laws in force in 1864 should be allowed under the bankrupt act. The constitutionality of this provision has never been declared, and yet, before the 3d of March, 1867, the date of the bankrupt act, many of the states might have altered, amended or repealed the exemption laws which were in force in 1864. Doubtless many of them did so before the passage of the act of 1373. Yet the bankrupt act of 1867 undertook to give effect, not to the exemption laws as they existed at its passage, and as they might be thereafter altered or amended, but as they existed in 1864. So, if the original act was uniform, the amendment of 1873 must be uniform.

Congress has undertaken to say that all exemptions in force at a certain date, by laws of the state, shall have effect under the bankrupt act. I think this sufficiently meets the requirement of uniformity, and that, to make the law uniform it was not necessary to enact that the bankrupt act should follow the shifting legislation of the states on the subject of exemptions, or the decisions of the state courts.

Thus the bankrupt act of 1867 continued the exemptions that were in force in Georgia in 1864, although those exemptions had been repealed and new ones established by the act of October 3, 1868.

Suppose the bankrupt act of 1867 had declared that all exemptions by the state law in force at the date of its passage should have effect under the bankrupt act. That would clearly be a uniform enactment. Would it cease to be such and become unconstitutional merely because the legislature of a state had, at a subsequent time, amended its exemption laws or the courts of another state had declared its exemption laws unconstitutional? I think it would not. In other words, I think Congress may adopt the state laws on the statute books of the state, at a particular date, in reference to exemptions, and that the legislation is uniform, although the laws in some of the states may afterwards be repealed by the legislature or declared null by the courts.

I am advised that a different view of the subject has been taken by the United States Circuit Court for the Eastern District of Virginia, *in re* Deckert, 1 American Law Times and Reports, 336, in which case the chief justice of the supreme court pronounced the opinion. But, in passing upon the constitutionality of an act of Congress, all the presumptions are in favor of the law. While, therefore, disposed to yield great weight to this high authority, I can not forget that in the opinion of the Congress of the United States this law is constitutional, and that the highest judicial authority has said that the courts ought not to pronounce a law unconstitutional unless its incompatibility be clear, decided and inevitable. Fletcher v. Peck, 6 Cranch, 87; Dartmouth College v. Woodward, 4 Wheat. 625; Livingston v. Morse, 7 Peters, 663.

While I admit that the argument against the constitutionality of this act is plausible and persuasive, yet I can not say that it is entirely convincing; it does not make the unconstitutionality of the act clear, decided and inevitable.

Resolving doubts, therefore, in favor of the law, I must decline to declare it unconstitutional, and I must affirm the decree of the district court.

Railroad Grant—Public Faith—State Bonds.

CHAMBERLAIN v. ST. PAUL & SIOUX CITY R. R., *ET. AL.**

Supreme Court of the United States, October Term, 1875.

1. Construction of Statute.—The act of Congress of March 3d, 1857, granting certain lands to the territory of Minnesota for the purpose of aiding in the construction of several lines of railroads between different points in the territory, only authorized for each road, in advance of its construction, a sale of one hundred and twenty sections; no further disposition of the land along either road was allowed except as the road was completed in divisions of twenty miles.

2. Claims of Bondholders.—Where land is conveyed to the state by a corporation as indemnity against losses on her bonds loaned to it, the bondholders have no equity for the application of the land to the payment of the bonds which can be enforced against the state, and her grantees take the property discharged of any claim of the bondholders.

Appeal from the Circuit Court of the United States for the District of Minnesota.

Mr Justice FEILD delivered the opinion of the court.

The plaintiff is the holder of bonds of the state of Minnesota amounting to half a million of dollars, and seeks to charge certain lands in the possession of the defendant railroad companies with their payment. The bonds were issued in 1859 to the Southern Minnesota Railroad Company, under the authority of the constitutional amendment of April, 1858. That company was one of the four companies to which the territory of Minnesota, on the 22nd of May, 1857, granted the lands obtained by the act of Congress of March 3d of that year. The grant of the state was made in express terms, subject to the provisions of the act of Congress, and would have been thus subject without any dec-

* For the decision of this case in the court below see 1 CENT. LAW JOURN. 53.

laration to that effect. The act of Congress only authorized a sale of one hundred and twenty sections for each road in advance of its construction. Any further disposition of the land along either road was allowed only as the road was completed in divisions of twenty miles.

The Southern Minnesota Railroad Company was authorized to construct two of the lines mentioned in the act of Congress, and took, therefore, under the grant of the state, a title to two hundred and forty sections. No title to any greater quantity passed from the state. In allowing one hundred and twenty sections for each line to be disposed of before the construction of any part of the road, Congress intended to furnish aid for such preliminary work as is required in all similar undertakings. We do not understand that the complainant contends that the company acquired an interest in any other lands than the one hundred and twenty sections for each of its roads.

In July of that year the lines of the two roads were definitely surveyed and located to the extent of the grading subsequently made, and maps of the surveys were filed in the general land office at Washington. But it does not appear that any other work for the construction of either of the roads was done during the year.

The territory of Minnesota became a state in October, 1857, and was admitted into the Union in May, 1858. Its constitution prohibited the loan of the state credit in aid of any corporation; but the first legislature assembled under it, being desirous of expediting the construction of the lines of road, in aid of which the congressional grant was made, proposed in March, 1858, an amendment to the constitution, removing this prohibition so far as the four companies named in the act of May 22d, 1857, were concerned. The amendment was submitted to the people, and on the 15th of April, of the same year, was adopted. It provided *first*, for the issue of bonds of the state to the railroad companies; *second*, for taking from them security for the payment of the interest, and against loss of the bonds thus issued; and, *third*, for a forfeiture of the lands and franchises of the companies in case certain portions of their respective roads were not completed within prescribed periods.

1st. The bonds were to be issued to each of the four companies, bearing interest at the rate of seven per cent. per annum, payable semi-annually in the city of New York, to an amount not exceeding twelve hundred and fifty thousand dollars, in installments of one hundred thousand dollars, as often as any ten miles of its road was ready for placing the superstructure thereon, and an additional installment of the same amount as often as that number of miles of the road was fully completed and the cars were running thereon, until the whole amount authorized was issued. The bonds were to be denominated Minnesota state railroad bonds; they were to be signed by the governor, countersigned and registered by the treasurer, and sealed with the seal of the state; they were to be issued in denominations not exceeding one thousand dollars, payable to the order of the company to whom issued, transferable by endorsement of the president of the company, and redeemable at any time after ten and before the expiration of twenty-five years from their date; and for the payment of their interest and the redemption of their principal the faith and credit of the state were pledged.

2d. The security to be taken for the payment of the interest on the bonds received by each company was to consist of an instrument pledging the net profits of this road, and the security against loss on the bonds was to consist of a conveyance to the state of the first two hundred and forty sections of lands, free from prior incumbrances, which the company was or might be authorized to sell; and a transfer to the treasurer of the state of an amount of first mortgage bonds on the roads, lands and franchises of the company corresponding in amount to the state bonds issued to it. The delivery of the first mortgage bonds necessarily implied the execution of a mortgage or deed of trust for their payment. In case either company made default in the payment of the interest or principal of the bonds issued to it by the governor, no more state bonds were to be thereafter issued to that company, and the governor was to proceed to sell, in such manner as might be prescribed by law, its bonds, or the lands held in trust, or require a foreclosure of the mortgage executed by the company to secure its bonds.

3d. Each company which accepted the bonds of the state was required, as a condition thereof, to complete not less then fifty miles of its road on or before the expiration of the year 1861, and not less then one hundred miles before the year 1864, and four-fifths of the entire length of its road before the year 1866; and the amendment declared that any failure on the part of the company to complete the number of miles of its road in the manner and within the several times thus prescribed, should forfeit to the state all the rights, title and interest of any kind whatsoever in and to any lands granted by the act of May 22d, 1857, together with the franchises connected with the same, not pretaining to the portion of the road then constructed.

The Southern Minnesota Railroad Company accepted the amendment, and executed the pledge of net profits and the conveyance of the two hundred and forty sections required. It also executed a deed of trust upon its roads and all its lands and franchises to secure its first mortgage bonds, to be transferred to the treasurer when state bonds were received. It then entered upon the construction of its roads, and contracted with the plaintiff to grade and prepare the road-beds for the superstructure. During that and the following year, 1859, thirty-seven and a half miles of one of the roads and twenty miles of the other road, were thus graded by the plaintiff. As often as any ten miles of either of the roads were ready for the superstructure, the governor issued to the company bonds of the state to the amount of one hundred thousand dollars. Nearly all of these bonds, amounting to half a million of dollars, were transferred to the plaintiff for his work in grading the roads, and are still held by him. They were endorsed by the president of the company with a waiver of presentment, demand and notice.

An act of the legislature passed on the 12th of August, 1858, required the first mortgage bonds of the company to be transferred to the treasurer, to be drawn so that the interest and principal should mature sixty days before the maturity of the interest and principal of the state bonds, and as the bonds of the company offered were accepted, we assume that they were so drawn. The act also provided for the foreclosure of the mortgage or deed of trust whenever default was made in the payment of either interest or principal.

The company never completed any part of either of its roads, and did nothing more than the grading mentioned, and it made default in the payment of the interest maturing upon the state bonds, and also in the payment of the interest accruing on its first mortgage bonds. The governor thereupon proceeded under the above act, and an act passed on the 6th of March, 1860, and procured a foreclosure of the mortgage of the company, and the roads, lands and franchises which it covered were sold pursuant to its provisions, and at the sale were purchased by the state. This purchase took place in October, 1860, and the necessary conveyances were made to the state. From that time until the 4th of March, 1864, the state held the property, lands, and franchises thus acquired. During this period, it made repeated efforts to induce other parties to undertake the enterprises and carry them to completion, but without success.

On the 4th of March, 1864, the legislature passed an act by which two new companies were organized: one, with the same name as the original company, The Southern Minnesota Railroad Company; and the other, by the name of the Minnesota Valley Railroad Company. The name of this latter company was afterwards changed to that of St. Paul and Sioux City Railroad Company.

To the companies thus organized the legislature granted, subject to certain conditions, all the property, rights and franchises of the original company, which the state had acquired, "free from all claims and liens;" those which appertained to one of the lines were granted to the new Southern Minnesota Railroad Company; those which appertained to the other line were granted to the Minnesota Valley Railroad Company, now the St. Paul and Sioux City Railroad Company. The conditions annexed to the grants were complied with and the grants accepted. These new companies soon afterwards commenced the construction of their respective roads, and had, at the commencement of this suit, nearly completed them. The Southern Minnesota Railroad Company had constructed and equipped one hundred and sixty-seven miles of its road, at an expenditure of five millions of dollars; and the St. Paul and Sioux City Railroad Company had constructed and equipped one hundred and seventy miles of its road, at an expenditure of three millions of dollars.

Upon the completion of ten miles of its road each company received from the governor, pursuant to the provisions of the act, a deed in fee simple of one hundred and twenty sections of land appertaining to its road, to which the state was entitled under the congressional grant, and the bonds of the original Minnesota company transferred to the treasurer of the state were cancelled.

Pending these proceedings the bonds of the state in the hands of the complainant remained unpaid, and they are still unpaid. The faith of the state, solemnly pledged for the payment of both principal and interest, has never been kept. So far from keeping it, the state, as, early as November, 1860, adopted an amendment to its constitution prohibiting any law, which levied a tax or made other provision for such payment, from taking effect until the same had been submitted to a vote of the people and been adopted by them. This prohibition, if not a violation of the state's pledge, conflicts with its spirit. The bonds issued are legal obligations; the state is bound by every consideration of honor and good faith to pay them. Were she amenable to the tribunals of the country, as private individuals are, no court of justice would withhold its judgment against her in an action for their enforcement.

The complainant under these circumstances, finding no relief from the pledged faith of the state, and unable to pursue any remedies at law against her on the bonds, seeks to charge with their payment the two hundred and forty sections mortgaged by the company under the amendment of 1858, and purchased by the state under the foreclosure of the mortgage, and now held by the defendant railroad companies.

The position of the complainant is, that notwithstanding the form of the contract, the original company was in fact the principal debtor, and the state its surety, and that as the creditor to be paid he is entitled to have the securities taken by the state applied to the payment of the bonds held by him: that the one hundred and twenty sections for each road, which the company was authorized to construct, because its property by the act of May 22d, 1857; that the subsequent interest of the state under the trust deed and mortgage was only the right to hold them as security against loss upon its bonds; that this interest was not changed by the foreclosure of the mortgage and purchase of the state at the sale; and that the lands passed to the defendant railroad companies with notice that they were thus held by the state.

The general doctrine, that a creditor has a right to claim the benefit of a security given by his debtor to a surety for the latter's indemnity, and which may be used if necessary for the payment of the debt, is not questioned. The security in such case is in the nature of trust property, and the right of the creditor arises from the natural justice of allowing him to have applied to the discharge of his demand, the property deposited with the surety for that purpose if required by the default of the principal. In this case the deed and mortgage to the state were not intended to create a trust in favor of the holders of her own bonds. The state was primarily liable to the bondholders; and it was only as between her and the company that the relation of principal and surety existed. It may be doubted whether the bondholders could call upon the company in any event. The endorsement made by the

president simply trrnsferred the bonds; it was not the act of the company. Be that as it may, whatever right the plaintiff had to compel the application of the lands received by the state to the payment of the bonds held by him, it was one resting in equity only. It was not a legal right arising out of any positive law or any agreement of the parties. It did not create any lien which attached to and followed the property. It was a right to be enforced, if at all, only by a court of chancery against the surety. But the state being the surety here, it could not be enforced at all, and not being a specific lien upon the property, can not be enforced against the state's grantees.

Where property passes to the state, subject to a specific lien or trust created by law or contract, such lien or trust may be enforced by the courts whenever the property comes under their jurisdiction and control. Thus, if property held by the government, covered by a mortgage of the original owner, should be transferred to an individual, the jurisdiction of the court to enforce the mortgage would attach, as it existed previous to the acquisition of the government. The Siren, 7 Wallace, 158. But where the property is not affected by any specific lien or trust in the hands of the state, her transfer will pass an unencumbered estate.

But aside from this consideration, which of itself is a sufficient answer to the present suit, the long delay of the complainant in asserting any claim to the lands in controversy, whilst the defendants were constructing, at a vast expenditure of labor and money, their railroads, deprives his suit of favorable consideration. It does not appear that for twelve years after the abandonment of work by the original Minnesota Company on the roads, the grading of which it commenced, he set up any claim such as is advanced in this suit. On the contrary, it is abundantly established that in various ways he urged upon members of the legislature the adoption of measures for the construction of the roads, which involved an appropriation by the state for that purpose of the lands in controversy; and that after the new companies were organized, and the lands were granted to them, he urged them to proceed with the enterprises, knowing that upon those lands they relied to carry on the works. Under these circumstances it would be manifestly inequitable and unjust to grant his prayer.

The conclusion we have reached renders it unnecessary to consider the effect of the alleged forfeiture, declared by the state, upon the interest of the company in the lands.

Decree affirmed.

Railway-Aid Bonds—Performance of Conditions Precedent.

MARCY v. TOWNSHIP OF OSWEGO.

Supreme Court of the United States, October Term, 1875.

A statute of Kansas, (Laws of Kansas, 1870, p. 189), enacted that whenever fifty qualified voters of a municipal township should petition the county commissioners to submit to the voters a proposition to take stock, in the name of the township, in any railway, designating in the petition, among other things, the amount of stock to be taken, the commissioners should order such election, provided that the amount of bonds voted by any township should not be above such a sum as would require a levy of more than one per cent. per annum on the taxable property of such township to pay the yearly interest; that the commissioners should make an order for holding the election, specifying therein the amount of stock proposed to be subscribed; that if three-fifths of the electors should vote for the subscription, the commissioners should order the clerk to make it in the name of the township, and should cause the bonds to be signed by the chairman of the board and attested by the clerk under the seal of the county. *Held*, that in a suit brought by a *bona fide* holder it could not be shown, as a defence, that at the time of issuing the bonds the value of the taxable property did not authorize the amount issued. *Held further*, (following Coloma v. Eaves, 3 CENT. LAW JOURNAL, 325); that when legislative authority has been given to a municipality to subscribe for the stock of a railroad company, and to issue municipal bonds in payment of the subscription, on the happening of some precedent condition of fact, and where it may be gathered from the legislative enactment that the persons designated to execute the bonds were invested with power to decide whether the contingency had happened, or whether the fact existed which was a necessary precedent to any subscription or issue of the bonds, their decision is final in a suit by the *bona fide* holder of the bonds against the municipality, and a recital in the bonds that the requirements of the legislative act have been complied with, is conclusive. Miller, Davis and Field, JJ., dissenting.

In error to the Circuit Court of the United States for the District of Kansas.

Mr. Justice STRONG delivered the opinion of the court.

At the trial in the circuit court the plaintiff proved by competent evidence that the bonds, coupons of which were declared upon, were part of a series of bonds for one hundred thousand dollars, voted and issued by the township, and that they were so voted and issued in strict compliance with an act of the legislature of the state, approved February 25th, 1870, unless they were voted and issued in excess of the amount authorized by the act. It became, therefore, a question whether, in this suit, brought by a *bona fide* holder for value to recover the amount of some of the coupons, it could be shown, as a defence to a recovery, that at the time of voting and issuing the series of bonds, the value of the taxable property of the township was not, in amount, sufficient to authorize the voting and issuing of the whole series, amounting to one hundred thousand dollars.

To solve this question there are some facts appearing in the case which it is necessary to consider. The bonds to which the coupons were attached contained the following recital: "This bond is executed and issued by virtue of, and in accordance with, an act of the legislature of the said state of Kansas, entitled 'An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same, approved February 25th, 1870,' and in pursuance of and in accordance with the vote of three-fifths of the legal voters of said township of Oswego, at a special election duly held on the 17th day of May, A. D. 1870." Each bond also declared that the board of county commissioners of the County of Labette (of which county the township of Oswego is a part) had caused it to be issued in the name and in behalf of said township, and to be signed by the chairman of the said board of county commissioners and attested by the county clerk of the said county, under its seal. Accordingly, each bond was thus signed, attested, and sealed. Nor is this all. The bonds were registered in the office of the state auditor, and certified by him in accordance with the provisions of an act of the legislature. His certificate on the back of each bond declared that it had been regularly and legally issued; that the signatures thereto were genuine, and that it had been duly registered in accordance with the act of the legislature.

In view of these facts, and of the decisions heretofore made by this court, the first question certified to us can not be considered an open one. We have recently reviewed the subject in the case of The Town of Coloma v. Eaves, and reasserted what had been decided before, namely, that where legislative authority has been given to a municipality to subscribe for the stock of a railroad company, and to issue municipal bonds in payment of the subscription, on the happening of some precedent contingency of fact, and where it may be gathered from the legislative enactment that the officers or persons designated to execute the bonds were invested with power to decide whether the contingency had happened, or whether the fact existed which was a necessary precedent to any subscription or issue of the bonds, their decision is final in a suit by the *bona fide* holder of the bonds against the municipality, and a recital in the bonds that the requirements of the legislative act have been complied with, is conclusive. And this is more emphatically true when the fact is one peculiarly within the knowledge of the persons to whom the power to issue the bonds has been conditionally granted.

Applying this settled rule to the present case, it is free from difficulty. The act of the legislature under which the bonds purport to have been issued, was passed February 25, 1870. Laws of Kansas, 1870, p. 189. The first section enacted that whenever fifty of the qualified voters, being freeholders, of any municipal township in any county should petition the board of county commissioners of such county to submit to the qualified voters of the township a proposition to take stock in the name of such township in any railroad proposed to be constructed into or through the township, designating in the petition (among other things) the amount of stock proposed to be taken, it should be the duty of the board to cause an election to be held in the township to determine whether such subscription should be made: provided, that the amount of bonds voted by any township should not be above such a sum as would require a levy of more than one per cent. per annum on the taxable property of such township to pay the yearly interest.

The second section directed the board of county commissioners to make an order for holding the election contemplated in the preceding section, and to specify therein the amount of stock proposed to be subscribed, and also to prescribe the form of the ballots to be used.

The fifth section enacted that if three-fifths of the electors voting at such election should vote for the subscription, the board of county commissioners should order the county clerk to make it in the name of the township, and should cause such bonds as might be required by the terms of the vote and subscription to be issued in the name of such township, to be signed by the chairman of the board and attested by the clerk, under the seal of the county.

These provisions of the legislative act make it evident not only that the county board was constituted the agent to execute the power granted, but that it was contemplated the board should determine whether the facts existed which, under the law, warranted the issue of the bonds. The board was to order the election, if certain facts existed, and only then. It was required to act if fifty freeholders who were voters of the township petitioned for the election; if the petition set out the amount of stock proposed to be subscribed; if that amount was not greater than the amount to which the township was limited by the act; if the petition designated the railroad company; if it pointed out the mode and terms of payment. Of course the board, and it only, was to decide whether these things precedent to the right to order an election were actual facts. No other tribunal could make the determination, and the members of the board had peculiar means of knowledge beyond what any other persons could have. Moreover, these decisions were to be made before they acted, not after the election and after the bonds had been issued.

The order for the election, then, involved a determination by the appointed authority that the petition for it was sufficiently signed by fifty freeholders who were voters; that the petition was such an one as was contemplated by the law, and that the amount proposed by it to be subscribed was not beyond the limit fixed by the legislature.

So, also, the subsequent issue of the bonds containing the recital above quoted, that they were issued "by virtue of and in accordance with" the legislative act, and in "pursuance of and in accordance with the vote of three-fifth of the legal voters of the township," was another determination not only of the result of the popular vote, but that all the facts existed which the statute required in order to justify the issue of the bonds.

It is to be observed that every prerequisite fact to the execution and issue of the bonds was of a nature that required examination and decision. The existence of sufficient taxable property to warrant the amount of the subscription and issue was no more essential to the exercise of the authority conferred upon the board of county commissioners than was the petition for the election, or the fact that fifty freeholders had signed,

or that three-fifths of the legal voters had voted for the subscription. These are all extrinsic facts, bearing not so much upon the authority vested in the board to issue the bonds as upon the question whether that authority should be exercised. They are all, by the statute, referred to the enquiry and determination of the board, and they were all determined before the bonds and coupons came into the hands of the plaintiff. He was, therefore, not bound, when he purchased, to look beyond the act of the legislature and the recitals which the bonds contained. It follows that the first question certified to us should be answered in the negative. Such being our opinion respecting the first question certified, the second and third question are immaterial, and they require no consideration.

The judgment of the circuit court is reversed, and a new trial ordered.

Mr. Justice MILLER dissenting.

We have had argued and submitted to us during the present term some ten or twelve cases involving the validity of bonds issued in aid of railroads by counties and towns in different states. They were reserved for decision until a late day in the term, and the opinions having been delivered in all of them within the last few weeks, I have waited for what I have thought proper to say by way of dissent to some of them until the last of these judgments are announced, as they have been to-day.

I understand these opinions to hold that when the constitution of the state or an act of its legislature imperatively forbids these municipalities to issue bonds in aid of railroads or other similar enterprises, all such bonds issued thereafter will be held void. But if there exists any authority whatever to issue such bonds, no restrictions, limitations, or conditions imposed by the legislature in the exercise of that authority can be made effectual, if they be disregarded by the officers of those corporations.

That such is the necessary consequence of the decision just read, in the cases from the state of Kansas, is too obvious to need argument or illustration. That state had enacted a general law on the subject of subscriptions by counties and towns to aid in the construction of railroads, in which it was declared that no bonds should be issued on which the interest required an annual levy of a tax beyond one per cent. of the value of the taxable property of the municipality which issued them.

In the cases under consideration this provision of the statute was wholly disregarded. I am not sure that the relative amount of the bonds, and of the taxable property of the towns, is given in these cases with exactness, but I do know that in some of the cases tried before me last summer in Kansas it was shown that the first and only issue of such bonds exceeded in amount the entire value of the taxable property of the town, as shown by the tax list of the year preceding the issue.

This court holds that such a showing is no defence to the bonds, notwithstanding the express prohibition of the legislature. It is therefore clear that so long as this doctrine is upheld it is not in the power of the legislature to authorize these corporations to issue bonds under any special circumstances or with any limitation in the use of the power, which may not be disregarded with impunity. It may be the wisest policy to prevent the issue of such bonds altogether. But it is not for this court to dictate a policy for the states on that subject.

The result of the decision is a most extraordinary one. It stands alone in the construction of powers specifically granted, whether the source of the power be a state constitution, an act of the legislature, a resolution of a corporate body, or a written authority given by an individual. It establishes that of all the class of agencies, public or private, whether acting as officers whose powers are created by statute or by other corporations or by individuals, and whether the subject-matter relates to duties imposed by the nation, or the state, or by private corporations, or by individuals, on this one class of agents, and in regard to the exercise of this one class of powers alone, most full, absolute, and uncontrollable authority be conferred on them or none. In reference to municipal bonds alone, the law is that no authority to issue them can be given, which is capable of any effectual condition of limitation as to its exercise.

The power of taxation, which has repeatedly been stated by this court to be the most necessary of all legislative powers, and least capable of restriction, may by positive enactments be limited. If the constitution of a state should declare that no tax shall be levied exceeding a certain per cent. of the value of the property taxed, any statute imposing a larger rate would be void as to the excess. If the legislature should say that no municipal corporation should assess a tax beyond a certain per cent., the courts would not hesitate to pronounce a levy in excess of that rate void.

But when the legislature undertakes to limit the power of creating a debt by these corporations which will require a tax to pay it in excess of that rate of taxation, this court says there is no power to do this effectually. No such principle has ever been applied by this court, or by any other court, to a state, to the United States, to private corporations or to individuals. I challenge the production of a case in which it has been so applied.

In the Floyd Acceptance Cases, 7 Wall. 666, in which the secretary of war had accepted time drafts drawn on him by a contractor, which, being negotiable, came into the hands of *bona fide* purchasers before due, we held that they were void for want of authority to accept them. And this case has been cited by this court more than once without question. No one would think for a moment of holding that a power of attorney made by an individual can not be so limited as to make any one dealing with the agent bound by the limitation, or that the agent's construction of his power bound the principal. Nor has it ever been contended that an officer of a private corporation can, by exceeding his authority, when that authority is express, is open and notorious, bind the corporation which he professes to represent.

The simplicity of the device by which this doctrine is upheld as to municipal bonds is worthy the admiration of all who wish to profit by the frauds of municipal officers. It is, that whenever a condition or limitation is imposed upon the power of those officers in issuing bonds, they are the sole and final judges of the extent of those powers. If they decide to issue them, the law presumes that the conditions on which their powers depended existed, or that the limitation upon the exercise of the power has been complied with, and especially and particularly if they make a *false recital* of the fact on which the power depends in the paper they issue, this false recital has the effect of creating a power which had no existence without it.

This remarkable result is always defended on the ground that the paper is negotiable and the purchaser is ignorant of the falsehood. But in the Floyd Acceptance Cases this court held, and it was necessary to hold so there, that the enquiry into the authority by which negotiable paper was issued was just the same as if it were not negotiable, and that if no such authority existed it could not be aided by giving the paper that form. In county bonds it seems to be otherwise.

In that case the court held that the party taking such paper was bound to know the law as it affected the authority of the officer who issued it. In county bond cases, while this principle of law is not expressly contradicted, it is held that the paper, though issued without authority of law, and in opposition to its express provisions, is still valid.

There is no reason, in the nature of the condition on which the power depends in these cases, why any purchaser should not take notice of its existence before he buys. The bonds in each case were issued at one time, as one act, of one date, and in payment of one subscription. All this was a matter of record in the town where it was done.

So, also, the valuation of all the property of the town for the taxation of the year before the bonds were issued is of record both in that town and in the office of the clerk of the county in which the town is located. A purchaser had but to write to the township clerk or the county clerk to know precisely the amount of the issue of bonds and the value of the taxable property within the township. In the matter of a power depending on these facts, in any other class of cases, it would be held that before buying these bonds the purchaser must look to those matters on which their validity depended.

They are all public, all open, all accessible,—the statute, the ordinance for their issue, the latest assessment roll. But in favor of a purchaser of municipal bonds all this is to be disregarded, and a debt contracted without authority, and in violation of express statute, is to be collected out of the property of the helpless man who owns any in that district. I say helpless advisedly, because these are not *his* agents. They are the officers of the law; appointed or elected without his consent, acting contrary, perhaps, to his wishes. Surely if the acts of any class of officers should be valid only when done in conformity to law, it is those who manage the affairs of towns, counties and villages, in creating debts which not they but the property owners must pay.

The original case on which this ruling is based is Knox County v. Aspinwall, 21 How. 544. It has, I admit, been frequently cited and followed in this court since then, but the reasoning on which it was founded has never been examined or defended until now. It has simply been followed. The case of the Town of Coloma v. Eaves, decided a few days ago, is the first attempt to defend it on principle that has ever been made. How far it has been successful I will not undertake to say. Of one thing I feel very sure, that if the English judges who decided the case of The Royal British Bank v. Torquand, on the authority of which Knox County v. Aspinwall was based, were here to-day, they would be filled with astonishment at this result of their decision.

The bank in that case was not a corporation. It was a joint-stock company in the nature of a partnership. The action was against the manager as such, and the question concerned his power to borrow money. This power depended in this particular case on a resolution of the company. The charter or deed of settlement gave the power, and when it was exercised the court held that the lender was not bound to examine the records of the company to see if the resolution had been legally sufficient.

This was a private partnership. Its papers and records were not open to public inspection. The manager and directors were not officers of the law, whose powers were defined by statute, nor was the existence of the condition on which the power depended to be ascertained by the inspection of public and official records made and kept by officers of the law for that very purpose. In all these material circumstances that case differed widely from those now before us.

It is easy to say, and looks plausible when said, that if municipal corporations put bonds on the market they must pay them when they become due. But it is another thing to say that when an officer created by the law exceeds the authority which that law confers upon him, and in open violation of law issues these bonds, the owner of property lying within the corporation must pay them, though he had no part whatever in their issue and no power to prevent it.

This latter is the true view of the matter. As the corporation could only exercise such power as the law conferred, the issuing of the bonds was not the act of the corporation. It is a false assumption to say that the corporation put them on the market.

If one of two innocent persons must suffer for the unauthorized act of the township or county officers, it is clear that he who could, before parting with his money, have easily ascertained that they were unauthorized, should lose rather than the property-holder, who might not know anything of the matter, or if he did, had no power to prevent the wrong.

Mr. Justice DAVIS and Mr. Justice FIELD concur with me in this opinion.

Remission of Indictments from United States District to Circuit Courts.

A CRITICISM ON THE CONSTRUCTION OF SECTION 1,037, REVISED STATUTES OF THE UNITED STATES, CONTAINED IN THE OPINION ON THE MOTION IN ARREST OF JUDGMENT IN THE McKEE CASE.

In its opinion in the McKee case, on the motion in arrest of judgment, the court, *per* DILLON, J., held:

"The legislation of Congress (Rev. Stat. Sec. 1037) authorizing the district court, by order entered on its minutes, to remit any indictment pending therein to the circuit court, does not require that the clerk of the district court shall transmit the original indictment, but an exemplification of the record, including a certified *copy* of the indictment."

To sustain which view it is shown, *arguendo*, substantially, that in England the *finding* of an indictment must be proved by a record regularly shown up, and not by the production of the indictment itself; that in the same country, indictments, with all the proceedings thereon, may be removed at any time before trial from an inferior court into the higher bench; that English books always speak of the "removal of the indictment" and the "delivery of the indictment" to the higher court, when, in fact, only the record and the proceedings of record are sent to the higher court; that where the removal is effected by *certiorari*, the writ commands to "certify all and singular the indictment," notwithstanding which it is executed by transmitting the *record* of the indictment, and that it is even improper to send up the original in such cases; that the removal of a criminal case in England after bill of indictment found, by *certiorari*, from an inferior to a superior jurisdiction for trial by jury and judgment is analogous ("quite analogous," is the language of the court) to the remission provided for by the statutes of the United States from one of its courts to the other, and that the English books invariably speak of the "removal of indictments," when, in fact, the removal is of but a *copy*; that it is as important and necessary to have the original in *certiorari* cases, as in cases of remission under the statute; that there are no decisions of the state which give real aid in the case; that they all concur in holding that *when the statute authorizes* the trial to be had upon the original *copy* of the indictment instead of the original, this may be done, but that it is doubtful whether a defendant can be sentenced upon a *copy* of a *lost* indictment; that, in "Shoemaker v. The State, 12 Ohio, 43, 51, the statute in terms required the 'original indictment' to be transmitted when the prisoner elected to be tried in the supreme court." And the court arrived at the conclusion "that there is no positive requirement in the statute that the original indictment should be sent," and the other propositions above stated. And, as another ground of its decision, the court were of the opinion the defendant had waived his right to make the objection, especially as he had had a fair trial. It is not intended to say anything respecting the second ground of the decision, but only to criticise briefly the decision so far as it construes section 1037. The argument of the court is certainly an able one, and carries with it much weight, especially as it is preceded by the statement that the judge and his associate who delivered it were, originally, rather of a different opinion. *Inter alia* it shows how difficult the proper application of rules of interpretation and construction sometimes is, and how easy it is to disregard the same. If it were, *in the first instance*, allowable to refer to extraneous circumstances to discover the meaning of this section, we might very consistently refer to the history of legislation by Congress and the views of the framers, as the same appear in the public documents and records, to show that in the drawing and enactment of this section no reference was had or analogy intended, in the remission of an indictment from one to another court, to the removal of an indictment from an inferior to a superior court by *certiorari*. But this is hardly allowable *in the first instance*. Neither, it seems to us, is it allowable to vary the unambiguous expressions of Congress, on the ground of inconvenience. It would seem that Congress was competent, both in point of intelligence and legal acumen, to understand the value and meaning of the words they used. But, even if this were not so, if the words of an act of Congress were couched in clear, precise terms, it would seem that those words should, if they could consistently have such, have that sense given them in which they are ordinarily used. Thus it is said that words are to be received and interpreted according to their common or popular import, or their plain and actual meaning, and in such a way as to carry into effect, if possible, the whole of a statute. Potter's Dwarris, Note 17, p. 200; Maillard v. Lawrence, 16 How. U. S. R. 260–1; Wigg v. United States, Dev. 157, Court of Claims, 1855–6; Chase v. Same, Id. 158. "The popular, or received import of words furnishes the general rule for the interpretation of statutes." Potter's Dwarris, p. 43; Maillard v. Lawrence, 16 How. 251: 7 Mass. 523–4. So, "When an act is expressed in clear and precise terms, when the same is manifest and leads to nothing absurd, there can be no reason not to adopt the sense which it *naturally* presents. To go elsewhere in search of conjecture in order to restrain or extinguish it, is to elude it." Jackson v. Lewis, 17 Johns. 475; People v. N. Y. Cent. R. R. Co., 13 N. Y. R. 78; Waterford and Whitehall Turnp. Co., 9 Barb. 161; Vattel, B. 2, Ch. 17, § 263; U. S. v. Fisher, 2 Cranch. 358; Potter's Dwarris, 143. "The office of interpretation is to bring a sense out of the words, and not to bring a sense into them." Beebe v. Griffin, 14 N. Y. 244; McClusky v. Coomwell, 11 N. Y. 593. And why should it not be so? Acts or statutes are the written law of the land, and everybody is *conclusively* presumed to know them and their meaning. Now what other meaning in justice, ought acts, etc., to have, in the first instance if they can consistently have them, than that which is implicated in the words, bearing the signification they have in ordinary use, as *ordinarily* understood. If they should have this sense *in the first instance*, then it is a rule, and whether the statute or act be one, in fact, that the masses ordinarily concern themselves little about, or not, it must nevertheless apply.

Indictment is the word used in the section, which is in these words: "Whenever the district attorney deems it necessary, any circuit court may, by order entered on the minutes, remit any indictment pending therein to the next session of the district court of the same district, where the offence charged in the indictment is cognizable by the said district court. *And in like manner any district court may remit to the next session of the circuit court of the same district any indictment pending in the said district court.* And such remission shall carry with it all recognizances, processes and proceedings pending in the case in the court from which the remission is made: and the court to which such remission is made shall, after the order of remission is filed therein, act in the case as if the indictment, and all other proceedings in the same, had been originated in said court."

A word which as ordinarily used means a written accusation, presented on oath by at least twelve of a grand jury, charging a person named therein which it specifically *describes*, (hardly "*defines*" as Mr. Bishop, § 133, Crim. Pro., 2d ed. has it), and returned by the grand jury into court. Mr. Bishop, in the section referred to, excepting the above correction, has given the above definition, and it is, we submit, substantially correct with the above correction made. He, however, adds, "where it becomes matter of record," but this can not be properly regarded as a part of the definition of an indictment. Among others, there are these elements found in an indictment, viz: It is found by a grand jury, is a piece of paper, containing a charge written in the form prescribed by law; these are essential, and if a copy of such an indictment is shown, it is no longer an indictment, but a *copy* thereof. In the first instance *indictment* is to be understood in this sense, as used in the section above quoted. Does this use of the word, or rather, this interpretation, create want of harmony between the parts of the section, or between the section and other sections in *pari materia*? Certainly not. Then what right have we to abandon that sense? If there is any doubt of its meaning, it seems to me it must be a *forced* or *manufactured* doubt, no natural one; but suppose there be a doubt, it is no more than that, and if so, must the statute be construed to make that doubt in favor of the government or the defendant?

But if we are right, there can be no doubt. Congress requires every word, if possible, to have effect, so as to make no part of the section superfluous.

Attention is now called to the third, and last period or clause of the section. Therein again appears the word indictment. Will you construe the word there to mean *copy*, etc., of an indictment? Surely not. Then this being so, what legal authority is there for giving the word, when used in the preceding part of the same section, that interpretation, especially when they both refer to the same instrument? If there was any doubt of the meaning of the word in the preceding clause, would it not be rather controlled by the meaning of the word in the last clause? We claim yes, but urge there is no *natural* doubt, as already claimed. Otherwise then, as above shown, the last clause or period does not, necessarily, aid in requiring the construction the court or we give the word. It seems to me, that from the language used therein, the remission *carries with it, ipso facto*, the recognizances, etc. The construction above given seems to us as correct, and it seems to us that it is a construction resulting after the *proper* application of correct rules of construction, a disregard of which latter has brought so much diversity among the decisions on similar statutes, and *uncertainty* into the law, of which the decisions under mechanics' lien acts are a marked instance.

We refer now to the argument of the court, in substance above stated. On the whole, it is worth remarking, that probably the court, with that zeal which is proverbial with it, argued itself into the opinion it expressed, not without some prepossession in favor of that view; a view superinduced by this fact, that the defendant had received a fair trial, which, equitably, may have been a proper one. With these prepossessions it occurred to the court that the argument it used was the best one. If our criticism is a correct one, we, of course, differ with it, in so far as we discuss the meaning of the above section. No enquiry is made herein as to the correctness and validity of the second ground of its decision.

The court rely on Mr. Bishop's definition, in the words "it becomes part of the record of the court." We claim that it is no part of the definition. Yet even if it were, according to our notion, it was no argument to show Congress intended other than what they expressed. What is done in *certiorari* and other cases is extrinsic to the section, and, if our view is the proper one, not in the first instance to be referred to in its construction; as little as is the history of legislation, etc. When Congress expressed something, inconvenience can hardly vary that expression, so as to interpolate other and additional words into the section, though, for that matter, it is hard to understand, in the remitting of an indictment under the section, remembering the construction of the district and circuit courts and their surroundings, where the inconvenience lies. That English books speak of indictment in *certiorari* cases, where they mean *record* or *certified copy*, etc., of the same, is, doubtless, true; so do they speak of contracts being *void*, when in fact, they are *voidable* only; *ordinarily*, indictment does not mean *copy of* an indictment, as may be inferred from the opinion of the court itself. It may, under certain circumstances, be improper and illegal to send up indictments, and proper only to send up a transcript or record thereof; but if this is any argument in the present construction, does it prove that it would have been improper to send up an indictment, notwithstanding Congress expressly said so. I say *expressly* had the ability to say what they intended, and the power, in this instance, to do what they did. If they had meant

copy, certified copy or *transcript* of an indictment, they had the ability —were competent—to say so, and even if they had not the ability, they said otherwise, and, it involving no absurdity or inconsistency, we must presume they meant what the word used in the connection it appears means. And they had the power to require the *indictment* to be remitted, and when they said so, that was sufficient. We suggest, that under these circumstances, to construe the word indictment in the section to mean *copy of* or *a certified copy of* an indictment is judicial legislation. It seems to us, that to so interpret the word, or construe the section, is to come in direct conflict with the above cited authorities and the doctrine by them affirmed. To give the word the meaning it ordinarily has does not avoid the rule which said so, which brings me to the proposition that there must have been "a positive requirement in the statute that the original indictment should be sent," taken from the Ohio case, by a *forced* inference. What, *ordinarily speaking*, is the difference between *an indictment* and *an original indictment?* When you ordinarily speak of indictment, you mean what the term *ordinarily* means, and *original* adds nothing to it, nor does it make the expression, properly, more *positive*. Read the word indictment in the last clause of the section; will you say that *original* was *necessary* to make that positive? If not, by what kind of reasoning will you require original as *necessary* to make *indictment* in the second clause thereof, positive. The other points made by the court it is hardly essential to notice. M. M. COHN.

Queries and Answers.

QUERIES.

[In order to save space, queries inserted in the JOURNAL will hereafter be numbered during the year. In answering queries, correspondents are requested to give the number of the query answered.]

11. Criminal Law—Lien of State on Property of Defendant.—Our Criminal Code, § 763, provides: " * * * in all cases of the commission, or attempt to commit a felony, the state has a lien, from the time of such commission or attempt, upon all the property of the defendant, for the purpose of satisfying any judgment which may be given against him, for any fine on account thereof, and for the costs and disbursements in the proceedings against him for such crime." How is such lien to be enforced in case of real estate? Would the lien prevail against real property in the hands of a *bona fide* purchaser, for value without notice of the commission, or attempt to commit a felony by the vendor? R. S. S., ALBANY, OREGON.

ANSWERS.

3. Right of Action on Covenant of Warranty.—See page 113, Rawle on Covenants. That author says: "Thus the covenant is obviously broken by the existence of prior taxes," and cites, Long v. Moler, 5 Ohio State, 272; Mitchell v. Pillsbury, 5 Wisconsin, 410.

R. S. S., ALBANY, OREGON.

Recent Reports.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF OHIO. By E. L. DEWITT, Attorney-at-Law. New Series. Volume XXV. Cincinnati: Robert Clarke & Co. 1876.

This volume embraces the cases decided by the court at the December term, 1874. It is closely printed, and contains nearly seven hundred pages exclusive of the index and table of cases. The number of opinions hardly exceeds one hundred, as several of the judgments, on the construction of tax laws, are very lengthy. By a rule of the supreme court of this state, the judge is required to prepare a syllabus of cases decided by him, to be confined exclusively to the points of law determined by the court. This is submitted to the judges concurring therein for revisal, and then inserted in the reports without alteration, unless by consent of the concurring judges. Whether the gentleman whose name appears on the title page, is the official reporter of the court, we are unable to say, as he does not describe himself as such. The rule quoted above leaves only the arrangement and indexing of the opinions to the compiler; his work therefore can not be very arduous. The index indeed, might be more full. To take as an example the first case reported Worthington v. Sebastian, p. 1, which holds that investments in bonds and stocks of foreign corporations by residents of Ohio may lawfully be taxed in that state. In the index this very properly appears under the head "Taxation," but nowhere else. It would have been more complete to have had cross references either to "Bonds," or "Foreign Corporations," or better still, to both. However, this may be an isolated instance, and will not detract from the real value of the book, which consists in its containing within its covers a large number of cases, indispensable to the lawyers of Ohio, and valuable to the profession at large. We append a number of the most important decisions, want of space alone, preventing a larger culling.

Attachment from Sister State—Pleading.—*Baltimore, etc., R. R. v. May*, p. 347. In an action to recover money due on contract, it is a sufficient defence to show that the money sought to be recovered has been attached by process of garnishment duly issued by a court of a sister state, in an action there prosecuted against the plaintiff by his creditors, although it appear that the plaintiff and such creditors are all residents of this state.

Total Loss—Misdirection of Jury—Negligence of Insured.—*Globe Ins. Co. v. Sherlock, et al.* Opinion by McIlvaine, C. J., p. 50. 1. Where a steamboat, injured at or near its home port by a peril insured against, remains in specie, the assured can not, without abandoning the vessel to the underwriter, claim indemnity as for a total loss, although the cost of repairing the vessel may exceed its value when repaired. 2. Where the jury has been misdirected in reference to a controlling question in the case, the judgment should be reversed and a new trial granted, although the weight of evidence may seem to support the verdict. 3. The rule that an insurer who has paid the loss resulting from a peril insured against, may be subrogated to all the claims which the insured may have against any person by whose negligence the injury was caused, does not apply in a case where the injury was caused by the negligence of the insured himself. But if the loss was caused by the wilful or fraudulent act of the insured, the same may be set up as a defence to an action on the policy, whether the subject of the insurance has been abandoned to the insurer or not.

Will—Reversion to Unborn Children.—*Gilpin et al. v. Williams et al.* Opinion by McIlvaine, C. J., p. 283. A testator devised certain lands to his daughter for life, with remainder after her death to her children then unborn, forever, without otherwise disposing of the inheritance. *Held*, the reversion in fee descended and vested in the heirs of the testator at his death, subject, however, to divest in the event that the devisee for life should die leaving children surviving her.

Boundary Line Altered by Agreement—Pleading—Statute of Frauds.—*Bobo v. Richmond.* Opinion by Rex, J., p. 115. 1. Where the boundary line of adjoining land owners, called for in their deeds, and ascertainable with certainty by survey, had been altered by agreement of the parties, and the occupancy by each up to the agreed line, by improvements and otherwise, had been acquiesced in and continued for a sufficient length of time to bar a right of entry, under the statute of limitations, *Held*, that an answer setting up these facts constitutes a good defence to an action by one of such owners, or his grantee with notice, for the recovery of the land lying between the two lines. 2. The fixing of a boundary line by parol is not within the operation of the statute of frauds—no estate is thereby created; but where the boundary line is fixed by the parties, they hold up to it by virtue of their title deeds, and not by virtue of the parol transfer.

Two Claimants to Same Trust.—*Presbyterian Society, (Hocking) v. Same, (Athens).* Opinion by Gilmore, J., p. 128. Where a trust is created for the benefit of an incorporated religious society, and there are two bodies, each claiming to be such society, a court of equity may require the claimants to interplead, and may proceed to ascertain the true beneficiary, without compelling either party to establish its corporate rights at law.

Embezzlement—Nature of the Crime—Where Trial to be Had.—*Gravatt v. The State.* Opinion by White, J., p. 162 1. A person employed at a monthly salary, who, in the discharge of his duties, is subject to the immediate direction and control of his employer, is, in an indictment for embezzlement, properly described as a servant. 2. On the trial of a charge of embezzlement, the fact that the money alleged to have been embezzled by the accused was received in several sums, at different times, and from different persons, affords no ground for requiring the prosecutor to elect on which sum he will rely for conviction. 3. Where the jury had been instructed as to what was necessary to constitute embezzlement, and that in order to convict the accused the offence must have been committed in the county laid as the *venue*, instructions directing the jury to enquire as to the county in which the accused formed the criminal intent, disconnected from acts designed to carry such intent into execution, were immaterial, and calculated to mislead, and were therefore properly refused.

Town Ordinance—Change of Charters.—*Neff v. Bates, et al.* Opinion by Rex, J., p. 169. 1. An ordinance of a town (which was afterward, by the act of May 3, 1852, organized as an incorporated village) prescribing the mode of assessing charges for street improvements, continues in force as a valid ordinance of the village, if the mode prescribed is consistent with the powers given to the village, on that subject, by the act named. 2. The owner of lands taken by a village for a public street, without compensation, who, with knowledge that his predecessor in title had undertaken to dedicate the land for such street, permits the street to be improved, under an ordinance assessing the expense on abutting lots, is estopped, as against a contractor, from resisting the payment of the assessment, on the ground that the lands so taken were not legally dedicated to the public for that purpose.

Partner Personally Responsible—Binding Firm without Authority—Evidence.—*Reis v. Hellman.* Opinion by Gilmore, J., p. 180. 1. Where a partnership entrusts money to a member of the firm to be used in the partnership business, and such member, without the knowledge or consent of his co-partners, forms a new partnership relation with another person, to engage in like business, and pays over the money to the other person to engage in like business, and pays over the money to the new firm, whereby it is lost, he thereby becomes liable to account for it, as though he had converted the same to his own use. 2. Where a written instrument, not the foundation of the action, is offered in evidence by a person not a party to the instrument, as an admission of the adverse party, touching a matter in issue, the fact that it is not stamped, as required by the act of Congress, is no ground of objection to its admission.

Defence of Recovery of Debt—Estoppel.—*Trimble v. Strother.* Opinion by White, J., p.378. 1. In an action to recover a debt which the defendant agreed with a third party to pay the plaintiff, it is a good defence to show that before the plaintiff assented to or acted on the

promise made in his favor, the agreement had been rescinded. 2. In such case, where the plaintiff has not been induced to alter his position by relying, in good faith, on the promise made in his favor, the defendant is not estopped from setting up any defence which he could have set up against the enforcement of the contract by the other contracting party.

Railway Ticket—Good only for Period Stated.—*Powell v. P. C. & St. L. R. R., per curiam*, p. 70. Where a railroad company sold a ticket, which entitled the purchaser to ride upon its cars a certain number of times within a given period, for a price below the usual rate of fare, which ticket specified upon its face that it was only good during such period, the purchaser, having failed to ride the specified number of times within the period named, is not entitled to ride upon such ticket after the expiration of the period.

Fire Policy Covers Collision—Pilot Barratry.—*Germania Ins. Co. v. Sherlock, et al.*, Opinion by McIlvaine, C. J., p. 133. 1. A policy of insurance on a steamboat against loss by fire only, covers a loss by fire caused by collision, where collision is not excepted by the terms of the policy, from the risk named. 2. Where the conduct of a pilot results in injury to the owner of the vessel, but is free from fraud, gross negligence, and wilful violation of a known positive law, he is not guilty of barratry within the rule of maritime or insurance law.

Statute of Limitations—Part Payment.—*Hance v. Hair.* Opinion by Rex., J., p. 349. A partial payment on a joint and several promissory note, by one of several makers, will not prevent the running of the statute of limitations as to the other makers.

Judgment Lien—Duration.—*Tucker v. Shade.* Opinion by Welch, J., p. 355. 1. Judgment liens are created by the statute, and their extent and duration are such as the statute prescribes. 2. Where five years intervene between the date of the last execution issued on a judgment and the time of suing out another, the judgment, under the statute, ceases to operate as a lien on the estate of the judgment-debtors, and the fact that in a suit between the judgment-debtor and the creditor, the latter was enjoined from issuing execution, will not have the effect to prolong the lien beyond the statutory period, as against a purchaser from the judgment-debtor.

Executor's Account not Final—When Settlement Conclusive.—*McAfee v. Phillips.* Opinion by Rex., J., p. 374. 1. An account rendered by an executor or administrator, and settled by the probate court, is not final, so as to bar further enquiry in regard to the assets of the estate in the hands of the executor or administrator, not accounted for or passed on. 2. Where such an account has been rendered and settled, the probate court may, at any time, within the time limited by the statute, compel the executor or administrator to render a further account of any assets of the estate in his hands, not settled in a former account. 3. The settlement of an account of an executor or administrator, by the probate court, is conclusive, as against parties with actual notice of the settlement, of all matters set out and specified therein, and as to such matters, the party rendering the account can not be required to account a second time, unless the same is impeached for fraud or manifest error.

Selling Liquor to Minors.—*State v. Munson.* Opinion by White, J., p. 381. 1. All who aid or participate in the commission of a misdemeanor are principals. 2. The supplying of intoxicating liquor to a minor to be drunk by him, is a furnishing of the liquor to the minor within the meaning of the act of April 5, 1866, although it may have been purchased by another and supplied by the seller to the minor in pursuance of such purpose.

Interest on Note—Usury.—*Monnett v. Sturges*, p. 384. 1. Under the act of March 14, 1850, allowing parties to contract for any rate of interest, not exceeding ten per cent., a note calling for interest at a rate higher than six per cent. carries the agreed rate after due, and until paid, as well as during the time it is made to run. 2. An agreement to pay interest semi-annually, at the rate of ten per cent. per annum, is not usurious within the meaning of said act.

Maritime Lien how determined—Sale on Void Process.—*Dowell et al. v. Goode.* Opinion by White, J., p. 390. 1. A lien exists under the maritime law for supplies furnished to a vessel in the port of a state in which her owner does not reside. 2. A suit *in rem* against the vessel to enforce such lien, can not be maintained in a state court, the exclusive jurisdiction, in such case, being vested in the courts of the United States. 3. For the purpose of ascertaining whether such lien exists, the home port of the vessel is to be determined by the residence of the owner, and not by the place of her enrollment 4. Where a vessel was furnished with supplies at the port of Cincinnati, the place of her enrollment, no owner residing in this state, the right to assert a maritime lien against the vessel, for such supplies, is not affected by the fact that one of the owners of the vessel resided in the adjoining city of Covington, in the state of Kentucky. 5. Where a judicial sale has been made on void process, the court may, while the purchase-money remains in the hands of the sheriff, on the application of the purchaser, set aside the sale and order the purchase-money to be refunded.

Usury—Rate of Interest—Citizens of Two States.—*Kilgore v. Dempsey.* Opinion by Gilmore, J., p. 413. 1. Where the borrower resided in Ohio, the laws of which state, at the time, allowed parties to contract for any rate of interest not exceeding ten per cent., and the lender resided in Pennsylvania, where six per cent. was the legal rate of interest, on a loan of money made in Ohio, the parties had a right to stipulate in the note for interest at ten per cent. per annum, payable semi-annually, and make the note payable in Pennsylvania, without thereby rendering the contract usurious. 2. In such case, if the borrower, at his option, purchases exchange at a premium, and remits the amount of interest to the place of payment in this form, the *premium* thus paid for the exchange will not render the contract usurious.

Assault with Intent—Evidence of Accessories—Confessions.—*Egner v. The State.* Opinion by McIlvaine, C. J., p. 464. 1. An indictment, wherein it is charged that the accused, on a certain day and at a certain county named, "in and upon one H. S., etc., did make an assault, etc., *with intent* him, the said H. S., unlawfully, wilfully, etc., to kill and murder," shows with sufficient certainty that the purpose to kill was in the mind of the accused at the time and place of the assault, and that he thereby intended to kill and murder H. S. 2. The burden of showing that a confession of guilt was obtained by improper inducements, rests with the defendant. 3. Where, on a criminal trial, a witness is offered by the state to prove a confession made by the defendant, to the admission of which testimony the defendant objects on the ground that the confession was not voluntary, it is the right of the defendant to enquire of the witness and prove his objection before the confession is given in evidence, and it is error for the court, in such case, to refuse him leave to make such examination until after the examination in chief has been concluded and the confession given to the jury. 4. A judgment in such case, however, will not be reversed for refusing the defendant leave to show, by preliminary proof, that the confession was obtained by improper inducements, unless the facts constituting the alleged inducements, as proposed to be proved, be set out in the record. 5. Where it is shown that two or more persons acted in concert in the commission of an alleged murder, it is competent for the state by proper testimony to show, upon the separate trial of one, the motives which actuated the others in the alleged homicide. 6. But ill feeling toward the deceased, on the part of those not on trial, can not be proved for the purpose of showing a conspiracy between them and the defendant to commit the homicide. 7. Nor can the declarations of those not on trial be proved in such case, to show their motives or malice on their part toward the deceased, unless such declarations were made during the pendency of the conspiracy and in furtherence of the common design. 8. Where an act or transaction is given in evidence for the purpose of showing the motive or state of mind which actuated the parties to it, it is proper, at least as a general rule, to permit the parties to be affected to show the immediate circumstances which led to the transaction, otherwise the real object of the enquiry may not be ascertained. [WHITE, J., was of opinion that where it becomes material to show that a murder or other offence was committed by several persons acting in concert, the motives of each to commit the offence may be proved; but that the declarations of the party not on trial, admitted in evidence in these cases, were not competent for that purpose.]

Stipulation in Restraint of Use of Premises—Injunction.—*Stines v. Dorman, per* White, J., p. 580. A stipulation in a deed of conveyance, whereby the grantee, in part consideration for the conveyance, agrees for himself, his heirs and assigns that the premises conveyed shall not be used or occupied as a hotel, so long as certain other property owned by the grantor shall be used for that purpose, binds both the grantee and all claiming under him, and may, in equity, be enforced by injunction.

Briefs.

[The purpose of this column is to aid practitioners in the exchange of briefs on important subjects. For this reason it is impossible for us to notice any brief which does not contain a statement of the case involved. It would be more satisfactory to all concerned, if those sending briefs would send with them succinct outlines of the points. Correspondents expecting to have their briefs noticed, must give their *post office* address.]

Homestead—Insolvency of Husband.—Williston *et al.* v. Zeigler *et al.*, Supreme Court of Louisiana. Brief for plaintiffs. The main question is whether, the husband being insolvent, a married woman can claim the homestead out of her lands. [Address Merrick, Race & Foster, New Orleans].

Missouri Stock Law—Delegation of the Law-Making Power—Legislation by the People.—Lammert v. Lidwell, Supreme Court of Missouri. Brief for appellant, pp. 8. The opinion of the court in this case, holding the law unconstitutional, was reported 3 CENT. LAW JOURNAL, 253. Numerous authorities are cited in this brief. [Address Horatio D. Wood, Esq., St. Louis].

Life Insurance—Premium Notes—Forfeiture.—Nettleton v. St. Louis Life Insurance Co., United States Circuit Court, District of Indiana. Brief for plaintiff, pp. 6. Action by the plaintiff against the defendant to recover the sum of $3,500, due on a policy on the life of the husband of the plaintiff. The complaint sets out the policy itself, and the receipt given to the insured on the 31st of July, 1872, as exhibits, and alleges full performance of all conditions required by the terms of the policy on the part of the insured to the 31st day of July, 1873. The defendant answers, setting up a failure to pay in advance the interest due on the outstanding note for premium, given July 31st, 1872, and that by the terms of the policy, said failure to pay the interest in advance worked a complete forfeiture of the policy. To the answer plaintiff demurs, which raises the question whether the averments in the answer are sufficient in law to avoid the complaint. [Address A. P. Hovey, Esq., Mount Vernon, Ind. Brief for defendants, C. Denby & D. B. Kumler, Esq's.

Legal News and Notes.

—The late sultan of Turkey published, in 1866, the first part of a civil code, which he had directed the supreme court of the empire to prepare.

—The President has nominated Winthrop W. Ketchum United States District Judge for the Western district of Pennsylvania vice McCandless, retired.

—Levi Jones, a litigous individual of Mercer, Pa., has just emerged from a lawsuit which he started about a dog, and came out second best, after paying $470.

—Marshfield, the former residence of Daniel Webster, and around which cluster so many pleasant memories of the great expounder of the constitution, was recently sold for $5,520 being $46.00, per acre.

—English Solicitors.—The duty on solicitors' certificates—the name of "attorney" no longer being used in legal circles—amounted in the year ended 31st of March last to £94,433. The number practising in the United Kingdom was 14,409.

—The *English Law Times* does not profess a very high regard for the new English court of appeal. When the case of Dickenson v. Dodds, 3 Cent. Law Journal 382, was decided by Vice-Chancellor Bacon, that journal thought it a correct decision. But the court of appeal, consisting of Lords Justices James, Mellish and Baggallay, reversed the decision of the vice-chancellor, whereupon the *Times* remarks: "In our opinion it would be going much too far to say that the decisions of the court of appeal, constituted as it is at present, are indisputable law."

—Oh for the good old court times, when the criers used to cry from the windows, as did the little red-headed man in Pasquotank county, when the court ordered, "Call John Amis and Mary Amis, Mr. Herring," and he poked his head out of the window and screamed, "John Amis and Mary Amis, John A——." "One at a time," said the court. "One at a time," "One at a time," screamed Mr. Herring. "Now you've done it," sang the court, turning very red in the face. "Now you've done it," "Now you've done it," screamed little Mr. Herring. Ah, there were callers from Callersville in those days.

—"Every Man His Own Lawyer."—Mr. Ridout, the late proprietor of *The Morning Post*, was his own lawyer and made his own will. The result is a little curious. Describing himself in his testament as the owner of the fashionable daily, he left by special clause sums varying from £25 to £50 to all his servants who had been five years in his employ. Clearly, he meant his domestic servants—those employed in his household—but having described himself as a newspaper proprietor, the words take a much more extensive range, and everybody employed in *The Morning Post* office is held to be legatee. Consequently, from the porter to the editor—compositors, reporters, correspondents,—the whole literary staff is the richer.—[*Irish Law Times*.

—There is a good story told of Sergeant Ballantyne, counsel in the famous cases of the Tichborne claimant and the Guicowar of Baroda. This distinguished barrister, as the story goes, was traveling down to his suburban house one night, when a friend asked him how it was that he managed to overtake all his work, and especially how he got on when two cases were called in different courts at the same time. "Well," replied the learned and witty sergeant, "I will give you a sample. To-day I was in just such a fix. One of my clients was a clergyman and the other a railway company, and I thought the best thing I could do was to stick by the railroad company, and leave the clergyman to Providence. I won my case." The occupants of the carriage in which they were riding were amused at the division of labor, and were laughing at it somewhat immoderately, when a mild-looking stranger in a white neckcloth interposed, and said: "And perhaps you will allow me to add, Mr. Sergeant, that we lost ours."

—The Belknap Impeachment.—The proceedings against the ex-secretary of war still drag slowly along before the senate. On the 7th, the defendant by Judge Black moved to vacate the order entered on the record overruling defendant's plea to the jurisdiction of the court, for the reason that said order was not passed with the concurrence of two-thirds of the senators present and voting upon the order. The following order was passed, yeas 33, nays 4: "*Ordered*, That Mr. Wm. W. Belknap have leave to answer the articles of impeachment within ten days from this date, and that in default of an answer to merits within ten days by the respondent to the articles of impeachment the trial shall proceed as upon a plea of not guilty." An order was entered that the defendant should furnish a list of his witnesses within four days after the prosecution furnishes its list. The senate then went into conference and on the doors being opened, it was announced that on the 6th of July, 1876, at one o'clock p. m., the senate sitting as a court of impeachment will proceed to hear the evidence on the merits.

—The great city of New York is now undergoing a considerable excitement, growing out of arrests under, and attempts to enforce, the Sunday liquor law. Recorder Hackett recently charged a grand jury that it was improper for a policemen, without warrant, to arrest a party, *in flagrante delicto*, and fault is found with this action of the recorder by some of the press. We are inclined to think that in this matter the city has attacked an adversary that will be too strong for it. A large majority of the citizens of New, York as in other large cities, are frequenters of saloons, and the Sunday law bears very hard on them. It is this class that elects police magistrates who are very apt, as this recorder has done, to back up their constituency in opposition to the enforcement of such an ordinance. The Sunday liquor law is doubtless a good thing, but we incline to the belief that all attempts to enforce it in the great metropolitan city will result in failures, and therefore had better be discontinued. Out of six hundred arrests under the law, none have been brought to trial.

—Liability on Raised and Certified Check. The suit of the Security Bank against the National Bank of the Republic, decided by the New York Court of Common Pleas, general term, presents an important question as to the effect of the certification of a check. A check on the plaintiffs for about $24 was obtained from H. J. Cipperly & Co., was raised to over $4,800, and was presented to Duff & Tienken, who sent it to the Security Bank, which certified it. In the court below, the rule laid down in the court of appeals that the certification of a check only warrants the genuineness of the signature, and that the bank has enough money of the drawer to meet the check, was held strictly, and an offer to show a well-settled custom among merchants and bankers to regard a certification as a guarantee of the amount, as well as of the drawer's signature, was rejected. Two of the judges at general term, J. F. Daly and Larremore, sustain this ruling. Chief Justice Daly dissents, and holds that the decision of the court of appeals was based on the settled custom as it appeared in the case before that court, and left the rule laid down to be modified by any other settled custom among business men, and therefore the offer of the defendants should have been admitted.

—Autrefois Convict.—This question has been lately before the United States District Court at New York. The point is a novel one. The defendant was indicted for embezzling a letter entrusted to him as a postal employee. The law provides that if the letter so taken contains an article of value, the punishment shall not be less than one year nor more than five years in the penitentiary; but if the letter does not contain an article of value, the imprisonment is not for more than one year. The indictment contained five counts. In the first four counts the letter was described as containing an article of value; in the last count the allegation of value was omitted. A plea of guilty was entered and recorded to the last count. Then to the other four counts of the indictment a plea of *autrefois convict* was filed. On argument, counsel for the defence insisted that taking a letter, and taking the same letter containing an article of value was one and the same offence, and that the defendant could not be tried and convicted for embezzling a letter, and then afterwards be tried for embezzling the same letter containing an article of value. Judgment was reserved. The decision one way or the other makes a difference of four years in the penitentiary to the prisoner.

—Some More Novel Patents.—Among the applications for patents to the Washington Patent Office, many are ridiculous in the extreme. One man applied for a patent for a method of rendering spirits visible. He said that the only reason why spirits do not make themselves visible to those they love, is that the currents and disturbances of the air annoy and bother them. In order to overcome this objection, he proposed to apply a suction pump to a room, suck the air all out, and thus form a perfect vacuum. The spirits then being troubled no longer, would become visible. As those who are to see the spirits, after they do become visible, can not live in a room in which there is no air, and as the pressure of the atmosphere would crush in any substance which is transparent enough to admit light and be seen through, even supposing that the theory is true, how is it possible to get a sight of the spirits? Another asked for a patent for the generation of steam by boring a hole down to the centre of the earth where everything is in a red hot, or molten condition. Among the advantages claimed for this unique method, is that there will be no danger of an explosion, and no expense for fuel or engineers. A professor once gave the following question to his class, each one of the scholars to think it over, and give him an answer on the following day: "Suppose a hole were bored through the centre of the earth down to China, and a cannon ball was dropped into the hole, where would the ball finally come to rest?" Next day he asked the first boy if he had thought about the question, and the boy replied: "I can't say that I have given much thought to the *main* question, but I have given a good deal to a subsidiary one. How are you going to get that hole through to China?" So in regard to this invention. It is not the expense or trouble after you have the steam, but how is the hole to be dug so deep? Another inventor wanted a patent for an artificial moon. His idea was to have an immense balloon which was to be moored in the air above the town or city, and from which would be suspended an electric light, or great fire. By means of this invention we were to become entirely independent of the moon, and dispense with gas lamps in the streets altogether. Still another wanted a patent for placing a large propellor wheel on the bow of a boat. The vessel was simply to be started by a steam engine, and then the forward motion of the boat would cause the water to turn the wheel on the bow, and this wheel would in turn impart motion to another wheel at the stern, which is to drive the boat forward. The inventor's great fear in regard to this invention was that it would be impossible to build a boat that would be strong enough to go through the water at the immense speed he expected to attain by means of his invention, and his great object was to invent some method to keep the boat from running more than fifty miles an hour. Another wanted to obtain a patent upon an embalming compound, and wishing to show how well it would preserve bodies, obtained the body of an infant, embalmed it in his best manner, and sent the body to the office as a model. His model was instantly returned to him. Applications for patents for perpetual motion are about as frequent as ever. Many of these inventions show a great deal of ingenuity, but all of them an utter lack of knowledge of the simplest laws of nature.